No. 78-1651

In the Supreme Court of the United States

OCTOBER TERM, 1978

SEATRAIN SHIPBUILDING CORPORATION, ET AL.,
PETITIONERS

v.

SHELL OIL COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL PARTIES

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INDEX

Argument—Continued

Argument—Continued

CITATIONS

Cases:

Cases—Continued Page

Cases—Continued Page

Cases—Continued — Page

Cases—Continued — Page

Statutes, rules and regulations: Page

Statutes, rules and regulations—Continued Page

Statutes, rules and regulations—Continued — Page

Statutes, rules and regulations—Continued — Page

Miscellaneous—Continued Page

Miscellaneous—Continued Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-61a) is reported at 595 F.2d 814. The opinion of the district court (Pet. App. 65a-95a) is reported at 445 F. Supp. 1128.

JURISDICTION

The judgment of the court of appeals was entered on February 6, 1979. Petitions for rehearing were

denied on March 22, 1979 (Pet. App. 62a-64a).[1] The petition for a writ of certiorari was filed on April 30, 1979, and was granted on June 18, 1979 (A. 604). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a district court order remanding a case for further administrative proceedings on the merits, subject to further district court review, constitutes a final decision appealable under 28 U.S.C. 1291.

2. Whether the Secretary of Commerce may relieve a vessel that has received and repaid a federal construction subsidy of the trade restrictions imposed by Section 506 of the Merchant Marine Act.

STATUTES AND RULE INVOLVED

The relevant statutes and rule are reproduced in the Appendix, *infra*, 1a-22a.

STATEMENT

1. The Merchant Marine Act, 1936 ("the Act"), 46 U.S.C. 1101 *et seq.*, represents an effort by the federal government to protect the national defense and to enhance foreign and domestic trade by "foster[ing] the development and encourag[ing] the maintenance of [an adequate American] merchant marine." 46 U.S.C. 1101. See, *e.g.*, *Sea-Land Service, Inc.* v. *Kreps*, 566 F.2d 763, 765-766 (D.C. Cir. 1977); *States Marine International, Inc.* v. *Peterson*, 518 F.2d 1070, 1073-1074 (D.C. Cir. 1975), cert. denied, 424 U.S. 912 (1976). Because American maritime expenses (such as wages and domestic construction costs) have historically exceeded the equivalent expenses incurred by foreign carriers, the Act establishes several grant and loan programs designed to stimulate the construction of ships at American shipyards and to ensure a substantial American merchant marine fleet operated by American crews. See 46 U.S.C. 1131 *et seq.*; H.R. Rep. No. 1277, 74th Cong., 1st Sess. 1-4, 11-13 (1935); H.R. Rep. No. 2168, 75th Cong., 3d Sess. 9, 23 (1938).[2] In particular, Title V of the Act, 46 U.S.C. 1151 *et seq.*, empowers the Secretary of Commerce ("the Secretary") to subsidize the construction costs of this country's overseas merchant fleet. See *Ray* v. *Atlantic Richfield Co.*, 435 U.S. 151, 179 n.28 (1978); *States Marine International, Inc.* v. *Peterson*, *supra*, 518 F.2d at 1082-1083.[3] These grants are referred to as construction differential subsidies ("CDS").[4]

[1] An amended order denying the suggestions for rehearing en banc was filed on April 3, 1979 (A. 602).

[2] In addition to the construction subsidy program at issue in this case, the Act contains an operating subsidy program ("ODS") (see 46 U.S.C. 1171 *et seq.*), a direct purchase program (46 U.S.C. 1191 *et seq.*), and a loan guarantee program for ship financing (46 U.S.C. 1271 *et seq.*).

[3] The program applies to the reconditioning and reconstruction of old vessels as well as to new construction. See 46 U.S.C. 1151(c).

[4] Between 1936 and 1978 the federal government awarded approximately $2.871 billion in CDS grants. Department of Commerce, *The Annual Report of the Maritime Administration for Fiscal Year 1978* 97 (1979). In FY 1978, the CDS program involved a total of $156 million. *Ibid.*

Only American citizens or American shipyards may receive CDS grants. 46 U.S.C. 1151(a), 1244(c). To qualify, the applicant must establish to the Secretary's satisfaction [5] that the proposed vessel's specifications will serve the needs of foreign commerce and national defense. 46 U.S.C. 1151(a)(1).[6] In addition, if the applicant is the proposed ship purchaser, he must demonstrate his financial and technical ability to operate and maintain the ship. 46 U.S.C. 1151 (a)(2). Finally, the Secretary must conclude that granting the CDS "is reasonably calculated to carry out effectively the purposes and policy of" the Act. 46 U.S.C. 1151(a)(3).

In the event that the Secretary approves the application, the applicant and the Secretary enter into a contract governing the details of the CDS transaction. Although the Secretary has broad contractual powers

[5] The Secretary has delegated the administration of the CDS program (as well as the ODS program, see note 2, *supra*) to the Maritime Subsidy Board. The Board consists of the Assistant Secretary for Maritime Affairs (who is also the administrator of the Maritime Administration, an operating unit of the Department of Commerce, see Merchant Marine Act of 1970, Pub. L. No. 91-469, Section 38, 84 Stat. 1036), the Deputy Assistant Secretary for Maritime Affairs, and the General Counsel of the Maritime Administration. 38 Fed. Reg. 19707-19708 (1973). See generally 46 C.F.R. 201 *et seq.* The Secretary may review decisions of the Maritime Subsidy Board. See *id.* at Part 202.

[6] The Secretary is required to submit the plans and specifications to the Navy for its determination whether "such vessel shall be suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency." 46 U.S.C. 1151(b).

under the Act (see 46 U.S.C. 1117, 1151, 1152 and 1154), the statute itself enumerates several terms that must be included in the contract. The ship must be built in an American shipyard, using "so far as practicable, only articles, materials, and supplies, of the growth, production, or manufacture of the United States * * *." 46 U.S.C. 1155.[7] The CDS is calculated as the difference between construction costs at the domestic shipyard and those at a representative foreign shipyard, but in no event may it exceed 50% of the cost of the proposed ship. 46 U.S.C. 1152(b). Payment of the CDS must follow either of two methods: the Secretary may contract with the shipyard to purchase the vessel and then resell the ship to the applicant for the purchase price less the CDS (46 U.S.C. 1152(a)) or she may pay the CDS directly to the shipyard, which would then collect the remainder of the purchase price from the applicant. 46 U.S.C. 1154.[8]

The CDS recipient, in turn, covenants to operate the vessel as an American flag ship for 25 years (46 U.S.C. 1153), unless the ship is a tanker, in which event the covenant runs for 20 years. Act of June 12, 1960, Pub. L. No. 86-518, Section 9, 74 Stat. 216, 217; see 46 U.S.C. 1125 Note. Moreover, except for

[7] If no American shipyard submits an acceptable bid, the Secretary may arrange for the construction of the vessel in a Navy shipyard. 46 U.S.C. 1152(e).

[8] Of course, the shipyard itself may be the applicant, in which case it must agree to sell the ship to a purchaser willing to operate the vessel in accordance with the requirements of the Act described below.

two limited circumstances, Section 506 of the Act requires the purchaser and all subsequent owners of a CDS ship to operate the vessel during its useful life (20 or 25 years) exclusively in this country's so-called "foreign trade." 46 U.S.C. 1156.[9] The first exception is that CDS vessels may sail in the domestic trade as either the first or last leg of an overseas voyage. 46 U.S.C. 1156. Second, the Secretary may consent to the operation of a CDS vessel in the domestic trade for up to six months in any 12-month period whenever she determines that "such transfer is necessary or appropriate to carry out the purposes of this chapter." 46 U.S.C. 1156. When a CDS vessel operates in the domestic trade, either as an adjunct to a foreign voyage or as an authorized temporary (six month) transferee, the owner of the vessel must repay a proportional percentage of the CDS.[10]

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[9] "Foreign trade" means trade between a foreign port and an American port. 46 U.S.C. 1244(a). "Domestic trade" means trade between American ports. See *American Maritime Association* v. *Blumenthal*, 590 F.2d 1156 (D.C. Cir. 1978), cert. denied, No. 78-1287 (May 14, 1979). Only American flag vessels may operate in the domestic trade. See 46 U.S.C. 883.

[10] Repayment of the CDS lessens the otherwise potential unfair competition between CDS vessels and the domestic merchant fleet, which is ineligible for CDS money. See H.R. Rep. No. 1277, *supra*, at 22-23, 35. With regard to the temporary domestic operation as part of an overseas voyage, the repayment equals the percentage of the annual portion of the CDS that the gross revenues attributable to the domestic traffic bear to the ship's annual gross revenues. With regard to the temporary (six month) transfer to the domestic service, the repayment equals the portion of the CDS that the period of temporary transfer bears to the useful life of the ship (*i.e.*, 20 or 25 years).

2. In 1969, petitioner Seatrain Shipbuilding Corporation ("Seatrain"), a wholly-owned subsidiary of Seatrain Lines, Inc., entered into a long-term lease of the former Brooklyn Navy Yard and began constructing a series of supertankers. As part of its construction program, Seatrain modernized the Navy Yard to accommodate civilian shipbuilding and commenced an extensive on-the-job training program directed at the predominantly minority and largely underemployed population living in the surrounding area. Although Seatrain expended approximately $38 million of its own funds on this ambitious project, it also received substantial federal and local financial assistance. In particular, the Economic Development Administration of the Department of Commerce ("EDA") loaned Seatrain $5 million outright and guaranteed 90% of another $82 million in loans (Pet. App. 9a, 69a; A. 111-113).[11]

In early June 1972, Seatrain applied for a CDS with regard to the T.T. STUYVESANT, a 225,000 deadweight ton oil tanker.[12] The Maritime Subsidy

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[11] The EDA, which administers the Public Works and Economic Development Act, 42 U.S.C. 3121 *et seq.*, initially guaranteed 90% of $42 million in loans with regard to Seatrain's conversion of the Navy Yard (Pet. App. 112a). In 1975, the EDA guaranteed 90% of another $40 million in loans in order to keep the facility in operation and to ensure completion of the STUYVESANT (A. 542-551). See 42 U.S.C. 3142; 13 C.F.R. Part 306.

[12] The STUYVESANT was the third supertanker built by Seatrain at the Navy Yard facility. Seatrain also constructed the previous two tankers (the T.T. BROOKLYN and the T.T. WILLIAMSBURG) with CDS monies (A. 112).

Board granted Seatrain's application on June 30, 1972, and awarded it a $27.2 million CDS to build the tanker. Moreover, the federal government guaranteed another $30.2 million in loans for the construction of the STUYVESANT pursuant to Title XI of the Act, 46 U.S.C. 1271 *et seq.* In accordance with Section 506 of the Act, Seatrain and petitioner Polk Tanker Corporation, a corporate affiliate of Seatrain and the owner of the STUYVESANT, agreed in return to operate the STUYVESANT exclusively in the foreign trade (Pet. App. 8a-9a, 69a; A. 19, 116-117, 436, 441-506, 508).

Unfortunately, by the time the STUYVESANT was completed in 1977, no market existed for the tanker in the foreign trade. The low oil prices and high demand for oil in the 1960's and early 1970's had spurred a world-wide flurry of oil tanker construction, resulting in an overabundance of tankers. In addition, the Arab oil embargo in 1973 dramatically reduced the demand for oil below what had been expected. Because (as noted above) American flag vessels face higher construction and operating costs, they are simply unable to compete with the surfeit of foreign vessels despite the CDS and ODS programs (Pet. App. 9a-10a, 69a; A. 34, 112-113, 133, 508, 570).

Although there continues to be no foreseeable prospect for the STUYVESANT's gainful employment in the foreign trade, there is a demand for the STUYVESANT's services in the Alaskan oil trade. But the Alaskan oil trade involves shipping between

Alaska and either East or West Coast ports—in short, domestic trade. Because the STUYVESANT had received a CDS, Section 506 of the Act precluded it from operating in the domestic trade for more than six months in any year. It is not economical, however, to operate the STUYVESANT for only six months per year, and no shipper in the Alaskan trade would charter the tanker on a part-time basis. Thus, in June 1977 the Standard Oil Company of Ohio (SOHIO) contracted with petitioner Polk for a three-year charter of the STUYVESANT in the Alaskan trade, but it conditioned the deal on petitioner's arranging for the STUYVESANT to operate in the domestic trade for the entire three years (Pet. App. 9a-10a, 69a-70a; A. 113-115, 133, 570-571).

Accordingly, in July 1977 petitioners filed an application with the Assistant Secretary of Commerce for Maritime Affairs and the Maritime Subsidy Board, seeking a three-year waiver from the restrictions of Section 506 in exchange for a pro rata repayment of the CDS. See 42 Fed. Reg. 37229 (1977). Subsequently, in August 1977, petitioners withdrew this application in the face of objections by various carriers in the Alaskan trade. At the same time, however, petitioners submitted a new application, requesting that the Secretary of Commerce accept full repayment of the STUYVESANT's CDS in exchange for the complete termination of the STUYVESANT's domestic trade limitations (Pet. App. 10a-11a, 70a; A. 18-33, 115-116, 529).

On August 31, 1977, the Secretary (through her designees) agreed to release the STUYVESANT permanently from its Section 506 restrictions on repayment in full of the CDS. Petitioner Polk promised to repay the $27.2 million CDS by means of a fully-secured 20-year interest-bearing note, and the Secretary agreed to delete the Section 506 restrictions from the CDS contract. Simultaneously with the consummation of this agreement, petitioner Polk was to transfer title in the STUYVESANT to the United States Trust Company ("USTC") as trustee for the equity owner, the General Electric Credit Corporation ("GECC"). As part of this sale, the Secretary approved the issuance of $31 million worth of federally-guaranteed (Title XI) bonds on behalf of USTC. USTC, which was to assume both the 20-year note and the more than $60 million outstanding indebtedness on the STUYVESANT (including the $31 million in newly-issued bonds), agreed to use the bond proceeds to pay off $28 million in EDA-guaranteed loans regarding the Brooklyn Navy Yard. USTC further agreed to pay petitioner Polk an additional $32.6 million, to be held in a special account as security for a guarantee by Seatrain Lines, Inc., to GECC. Finally, USTC planned to charter the STUYVESANT to Queensway Tankers, which in turn was to charter it to SOHIO for three years (Pet. App. 11a, 70a-71a; A. 34-44, 116-119).

In approving these transactions, the Secretary found that her actions were warranted because (1) the STUYVESANT could be operated profitably only

in the Alaskan trade, (2) the CDS repayment and SOHIO charter would improve the security for debts owing to the government and prevent default on the government-guaranteed obligations, and (3) failure to approve the transactions would jeopardize the continued economic viability of Seatrain and its Brooklyn operations, which are backed by substantial government guarantees (Pet. App. 91a; A. 34).

3. On September 22, 1977, respondents Shell Oil Company, Alaska Bulk Carriers, Inc., and Trinidad Corporation ("the plaintiffs") filed suit in the United States District Court for the District of Columbia against various federal defendants.[13] The plaintiffs, who own and operate vessels in the Alaskan trade, alleged that (1) the Secretary is without power to release the STUYVESANT from its Section 506 restrictions, (2) even if the Secretary could release the tanker from the restrictions in return for full repayment of the CDS, she abused her discretion in this case by failing to consider the competitive effects of these transactions, and (3) in authorizing the CDS repayment, the Secretary did not adhere to the procedures prescribed by the Administrative Procedure

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[13] The defendants were Secretary of Commerce Juanita Kreps, then Assistant Secretary of Commerce Robert Blackwell, then Deputy Assistant Secretary of Commerce Howard Casey, then General Counsel to the Maritime Administration Samuel Nemirow, the Maritime Administration, and the Maritime Subsidy Board (Pet. App. 4a, 66a; A. 6-7, 9, 45, 47). The district court allowed petitioners to intervene as defendants (A. 3).

Act ("APA"), in violation of 5 U.S.C. 706(2)(D).[14] The district court issued a temporary restraining order. On September 30, 1977, the court dissolved that order and denied the plaintiffs' request for a preliminary injunction.[15] The STUYVESANT transactions were closed the same day (Pet. App. 12a, 66a, 71a-72a; A. 6-16, 45-63, 170-171).

Both sides then moved for summary judgment. On November 22, 1977, the district court granted partial summary judgment in favor of petitioners and the federal parties, concluding that the Secretary has the authority under the Act to release the STUYVESANT from its Section 506 trade restrictions in exchange for repayment of the CDS. According to the district court, such authority is inherent in the Secretary's broad contractual powers under Sections 207, 504, and 1104(a)(3) of the Act, 46 U.S.C. 1117, 1154 and 1274(a)(3). The court further held, however, that the Secretary had abused her discretion in failing to analyze the economic effects of the STUYVESANT transactions on domestic carriers. Accordingly, the court remanded the case to the Secretary for speedy consideration of the competitive consequences of her decision. Finally, the court denied the parties' cross-motions for summary judgment regarding the

[14] Plaintiffs claimed that the Secretary had improperly withheld information about the STUYVESANT decisions from the public.

[15] The court concluded that "plaintiffs have not sustained their burden to establish immediate and irreparable injury * * * [and they] have not * * * proved a likelihood of success on the merits" (A. 171).

plaintiffs' APA claim, finding that material facts relating to it were in dispute (Pet. App. 65a-95a).

Before the Secretary had rendered an opinion on remand, the plaintiffs moved to dismiss their APA claim and asked for entry of a "final order." On November 30, 1977, the district court granted this motion and entered a "final order," apparently relying on Fed. R. Civ. P. 54(b) (A. 558-559). While the Secretary was still conducting the proceedings on remand, the plaintiffs appealed from the district court's holding that the Secretary has the authority to accept repayment of the CDS and to permit a ship formerly subject to trade restrictions to engage in the domestic market.[16]

Prior to oral argument in the court of appeals, the Secretary completed the remand proceedings, concluding that the STUYVESANT transactions would have little or no adverse effect on the plaintiffs. In particular, the Secretary made detailed findings about the demand for tankers in the Alaskan trade and determined that demand would continue to exceed supply for the foreseeable future (A. 566-599). The Secretary therefore adhered to her prior decisions regarding the STUYVESANT.[17]

[16] Petitioners cross-appealed, challenging the plaintiffs' standing to bring this suit. See note 38, *infra*.

[17] Plaintiff Shell filed a second suit in the district court challenging the Secretary's findings on remand. *Shell Oil Co.* v. *Kreps*, Civ. No. 78-1919 (D. D.C. Oct. 13, 1978). The district court dismissed that action without prejudice following the court of appeals' decision in this case.

4. A divided panel of the court of appeals reversed and remanded, holding that the Secretary cannot lift the STUYVESANT's domestic trade restrictions (Pet. App. 1a-51a). The court rejected the Secretary's argument that her broad contractual powers under the Act supplied such authority, concluding that the six-month temporary waiver provision in Section 506 impliedly negated any authority to grant permanent releases. The court also concluded that no other provision of the Act empowered the Secretary to relieve a vessel of its CDS restrictions and that it need not defer to the contrary administrative construction because "[w]e find the Agency's internal interpretations of dubious consistency, and neither numerous nor impressive" (*id.* at 32a).

Judge Bazelon dissented, arguing that the language and legislative history of Section 506 failed to support the majority's conclusion that Congress intended to preclude permanent removal of a vessel's domestic trading restrictions (Pet. App. 52a-55a). In his view, Section 207 of the Act, 46 U.S.C. 1117, empowered the Secretary to relieve the STUYVESANT of its contractual obligations in return for full repayment of the CDS (Pet. App. 60a n.17). Furthermore, Judge Bazelon noted that the Secretary's construction of the Act, which was supported by several sections of the statute and by the legislative history of the 1972 amendments to the Act, was entitled to substantial deference (*id.* at 55a-61a). Finally, Judge Bazelon observed that "full repayment [of the CDS] places the formerly subsidized carrier on an equal footing

with the other vessels in the [domestic-unsubsidized] fleet, and the possibilities of abuse are thereby eliminated" (*id.* at 61a).[18]

SUMMARY OF ARGUMENT

Under Title V of the Merchant Marine Act, 1936, 46 U.S.C. 1151 *et seq.*, the federal government subsidizes the construction costs of this country's overseas merchant marine fleet. In order to effectuate this construction differential subsidy ("CDS") program, the Act confers broad contractual powers on the Secretary of Commerce. As we demonstrate in point II, those powers include the authority to relieve a CDS-financed vessel of the trade restrictions imposed by Section 506 of the Act, 46 U.S.C. 1156, in return for repayment in full of the CDS. In our view, however, this issue of statutory power is not properly before the Court, because the court of appeals lacked jurisdiction to hear this case.

I.

A. The final judgment rule, now codified at 28 U.S.C. 1291, permits the courts of appeals to review "final decisions" of district courts. Because Section 1291 embodies a strong congressional policy against piecemeal review, "[f]ederal appellate jurisdiction generally depends on the existence of a decision by the

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[18] Judge Bazelon added, however, that in order to achieve complete equality he would "require the amount of repayment to include interest on the [CDS] subsidy [between 1972 and 1977]" (Pet. App. 59a n.15).

District Court that 'ends the litigation on the merits and leaves nothing for the court to do but execute the judgment.'" *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 (1978), quoting from *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). Accordingly, the courts of appeals have uniformly concluded that a district court order that does not finally determine the merits of a controversy but rather remands the case for further non-ministerial administrative proceedings is ordinarily not a final decision. There is no justification for departing from that rule here.

In its November 30, 1977 order, the district court held that, although the Secretary is empowered to undo or modify a CDS transaction in appropriate circumstances, she had abused her discretion in this case by failing to consider the economic impact of the STUYVESANT transaction on the existing Alaskan trade. The court therefore remanded the case to the Secretary for prompt consideration of that economic issue, following which further review in the district court was contemplated. The November 30 order thus did not finally decide plaintiffs' claim for relief, namely, the exclusion of the STUYVESANT from the Alaskan trade. See *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737 (1976); *Boston & Maine Railroad* v. *United States*, 358 U.S. 68 (1958). Plaintiffs might have prevailed before the Secretary, in which event they would have had no need to appeal. Moreover, since the November 30 order decided an issue that is central, not collateral, to the merits of this controversy and that could have been adequately

reviewed upon entry of a final decision following the remand proceedings, there is no reason to stretch the finality rule to encompass this order.

This analysis is buttressed by the policies that inform the final judgment rule. If remand orders such as the one at issue here were appealable as of right, the already congested courts of appeals would be inundated by unnecessary or duplicative appeals and would be forced to decide legal issues without the benefit of a fully developed record. Furthermore, allowance of such appeals would adversely affect the administration of justice at the district court level. As this Court has repeatedly observed, interlocutory appeals interfere with district court calendars, indiscriminately thrust the appellate courts into the trial process, and generally increase the cost and time involved in dispute resolution. See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 473-476. In sum, even assuming that immediate appellate review of district court remand decisions such as the November 30 order might occasionally aid a particular litigant or expedite a particular litigation, those incremental benefits would be far outweighed by the substantial costs that would be imposed on the judicial system as a whole, for "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll* v. *United States*, 354 U.S. 394, 405 (1957).

B. The district court's attempt to certify the November 30 order in accordance with Rule 54(b) of the Federal Rules of Civil Procedure did not render that decision final within the meaning of Section

1291. Rule 54(b) authorizes a district court to enter a final judgment as to one or more distinct claims in circumstances in which other, independent claims remain to be decided. The rule is inapplicable to single claim actions. See *Sears, Roebuck & Co.* v. *Mackey*, 351 U.S. 427, 435 (1956). Here, plaintiffs alleged only one claim for relief arising out of one set of facts: that the STUYVESANT could not lawfully operate in the Alaskan trade for more than six months per year. To be sure, plaintiffs asserted two legal theories in support of their single claim. But it is well settled that a district court decision rejecting less than all alternative legal theories underlying a single claim may not be certified under Rule 54(b).

Nor did the district court's improper Rule 54(b) certification satisfy the strict requirements for taking an interlocutory appeal pursuant to 28 U.S.C. 1292(b). See *Liberty Mutual Insurance Co.* v. *Wetzel*, *supra*, 424 U.S. at 745-746. Section 1292(b) permits appellate review of non-final orders, but only when three essential conditions have been met. Plaintiffs' appeal satisfied none of these conditions: plaintiffs did not timely move to certify their interlocutory appeal in accordance with Section 1292(b), and neither the district court nor the court of appeals expressly exercised its discretion to allow the appeal.

C. Finally, the November 30 order was not appealable as an interlocutory order "refusing * * * [an] injunction[]." 28 U.S.C. 1292(a)(1). As the Court explained in *Switzerland Cheese Ass'n, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23, 25 (1966), Section

1292(a)(1) permits interlocutory appeals only from those orders that "settle * * * the merits of the [injunctive] claim." The district court did not settle the merits of plaintiffs' request for a permanent injunction. Instead, it merely rejected one of plaintiffs' legal theories underlying the claim for injunctive relief and deferred ruling on the other theory pending the outcome of the remand proceedings.

II.

If the Court disagrees with the government's jurisdictional arguments, it must determine whether the Secretary may permanently lift the trade restrictions imposed by Section 506 of the Act from a vessel that has fully repaid its CDS. We submit that the Secretary has authority to modify or undo a CDS transaction as part of her broad contractual powers under the Act. "When Congress in an act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it." *Arizona* v. *California*, 373 U.S. 546, 580 (1963). Furthermore, Section 207 of the Act provides that the Secretary may "contract[] * * * to protect, preserve, or improve the collateral held by [the government] to secure indebtedness," and here the Secretary expressly found that the STUYVESANT transaction was necessary to avoid default on millions of dollars of government-guaranteed loans. Thus, unless some provision of the Act explicitly prohibits the Secretary from terminating the Section 506 trade limitations in exchange for full repayment of a CDS, the court of

appeals incorrectly held that the STUYVESANT transaction was unlawful.

The court of appeals concluded that Section 506 of the Act impliedly constitutes a statutory bar to the STUYVESANT transaction. Section 506 does limit the extent of domestic trading that a vessel that enjoys the benefits of a CDS may carry on. It does not, however, govern the trading opportunities of a vessel that has completely relinquished the benefits of a CDS. Nothing in the language of Section 506 purports to restrict permanently a ship that has received a CDS, even if that ship has completely amortized or fully repaid its subsidy. Moreover, because Section 506 only addresses the permissible amount of competition between subsidized and unsubsidized vessels, the court of appeals' decision, which inhibits competition within the unsubsidized fleet, does not effectuate the purposes of that section. In short, the STUYVESANT transaction is quite different from the temporary transfers to the domestic trade that are the subject of Section 506.

The legislative history of the Act confirms that Congress intended to allow reverse-CDS transactions. As originally passed in 1936, the Act unquestionably permitted the Secretary to relieve a vessel of its domestic trade restrictions on repayment of "an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid * * * as the remaining economic life of the vessel bears to its entire economic life." Merchant Marine Act, 1936, ch. 858, Section 506, 49 Stat. 1999. At the same

time, the original statute was ambiguous as to whether a pro rata CDS repayment was required when a subsidized vessel entered the domestic service on a temporary basis. In amending the Act in 1938 to eliminate the latter confusion, Congress deleted the Secretary's express authority to enter into STUYVESANT-type transactions. The legislative history of these amendments strongly indicates, however, that the deletion was inadvertent and that Congress desired to increase, not to limit, the Secretary's power to administer the CDS program in order to effectuate the statutory goals.

The Secretary has construed the Act on a number of occasions to permit the permanent release of a vessel's trade restrictions on repayment of the CDS. The court of appeals should have deferred to this reasonable and long standing administrative construction of the Act. The court's failure to do so is particularly inexcusable because Congress has repeatedly ratified that construction. See, *e.g.*, *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-382 (1969). Indeed, Congress has not only expressly acknowledged and appproved the Secretary's interpretation, it has also amended the Act in order to facilitate CDS repayments for the purpose of allowing previously subsidized ships to engage in the domestic trade.

Finally, the court of appeals' decision is inconsistent with the overriding policy of the Act, which is to develop and maintain an active, modern merchant marine in the United States. 46 U.S.C. 1101. The decision below would compel the STUYVESANT to be laid up despite the scarcity of tankers in the Alaskan oil trade and despite the substantial adverse economic impacts—including the preservation of plaintiffs' economic control of the Alaskan market—that would inevitably result from the STUYVESANT's forced unemployment. Furthermore, in the long run, a decision preventing the Secretary from ever releasing a vessel from its Section 506 restrictions would undoubtedly lessen the attractiveness of the CDS program and would diminish, rather than enhance, the growth of this nation's merchant fleet.

ARGUMENT

I.

THE COURT OF APPEALS LACKED JURISDICTION OVER THIS CASE BECAUSE THE DISTRICT COURT'S NOVEMBER 30 ORDER WAS A NON-APPEALABLE INTERLOCUTORY DECISION

In our view, the court of appeals was without jurisdiction to hear plaintiffs' appeal from the November 30 order of the district court. Because the district court remanded the case to the Secretary for further proceedings on the merits, following which additional review in the district court was contemplated, the November 30 order was not a "final decision" under 28 U.S.C. 1291. Nor could the court's erroneous invocation of Rule 54(b) of the Federal Rules of Civil Procedure render the November 30 order appealable, because that order did not finally settle any party's claims or finally determine a separate claim for relief. Moreover, although Congress has created several narrow exceptions to the final judgment rule, the November 30 order was not appealable under any of these exceptions.

A. The District Court's Order Remanding The Case For Further Administrative Proceedings Was Not A Final Decision Appealable Under 28 U.S.C. 1291

1. Appellate jurisdiction is, of course, a matter of legislative grace, dependent on a "clear statutory mandate." See, *e.g.*, *Carroll* v. *United States*, 354 U.S. 394, 399 (1957); *Cobbledick* v. *United States*, 309 U.S. 323, 325 (1940). In the federal system, the

dominant principle of appellate jurisdiction has always been the final judgment rule. See, *e.g.*, *DiBella* v. *United States*, 369 U.S. 121, 124-126 (1962); C. Wright, *Law of Federal Courts* § 101, at 452 (2d ed. 1970).[19] The first Judiciary Act provided that appellate review was available only with regard to "final judgments and decrees." [20] Similarly, with the exception of interlocutory orders "granting or continuing" injunctions, the jurisdiction of the courts of appeals was initially limited to review of "final decisions." See Sections 6 and 7 of the Evarts Act (Act of March 3, 1891), ch. 517, 26 Stat. 826, 828.[21] As we discuss below, Congress has from time to time created limited statutory exceptions to the final judgment rule. See *Baltimore Contractors, Inc.* v. *Bodinger*, 348 U.S. 176, 180 n.6 (1955); 28 U.S.C. 1292. Nonetheless, the finality rule, which is now codified at 28 U.S.C. 1291, still largely governs questions of federal appellate jurisdiction.

The jurisdictional question posed by this case is whether an order remanding a case for further non-

[19] The final judgment rule was derived from well established English antecedents. *McLish* v. *Roff*, 141 U.S. 661, 665 (1891); *Bachowski* v. *Usery*, 545 F.2d 363, 367 (3d Cir. 1976); see, *e.g.*, *Metcalfe's Case*, 11 Co. Rep. 38a, 77 Eng. Rep. 1193 (K.B. 1615).

[20] Act of September 24, 1789, ch. 20, Sections 21, 22, 25, 1 Stat. 73, 83-85.

[21] See also Judicial Code of 1911 (Act of March 3, 1911), ch. 231, Section 128, 36 Stat. 1087, 1133; Act of February 13, 1925, ch. 229, 43 Stat. 936-937.

ministerial administrative proceedings is a "final decision" within the purview of Section 1291. The Court has never precisely addressed this issue; it has, however, construed Section 1291 and its predecessors on numerous occasions. We submit that these decisions—although "not altogether harmonious," see *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 170 n.9 (1974), quoting *McGourkey* v. *Toledo & Ohio Ry.*, 146 U.S. 536, 545 (1892)—strongly support the conclusion that the court of appeals lacked jurisdiction to consider plaintiffs' appeal.

Consistent with the language [22] and legislative history [23] of the finality rule, the Court has repeatedly

[22] *Webster's Third New International Dictionary* 851 (1976) defines "final" as "CONCLUSIVE, DECISIVE"; "ending a court action or proceeding leaving nothing further to be determined by the court or to be done except the administrative execution of the court's finding but not precluding an appeal"; and "LAST, TERMINATING." *The Shorter Oxford English Dictionary* 700 (1966) similarly defines "final" as "[c]oming at the end; marking the last stage; ultimate. * * * Putting an end to something; conclusive * * *. Completion, end, finish."

[23] In enacting the Judiciary Act of 1789, Congress did not expressly illuminate what it considered to be a "final decree." However, insofar as Congress based the final judgment rule on contemporaneous English practice, it is reasonable to infer that Congress intended a final decree to be an order that conclusively terminated all issues raised in a case. See note 19, *supra*.

The legislative history accompanying the Interlocutory Appeals Act of 1958, Pub. L. No. 85-919, 72 Stat. 1770, 28 U.S.C. 1292(b), is more instructive. That statute expanded the jurisdiction of the courts of appeals by permitting discretionary review of non-final orders in exceptional cases. See, *e.g.*, Note, *Discretionary Appeals of District Court Interlocu-*

remarked that ordinarily a final order is one that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 (1978); *Parr* v. *United States*, 351 U.S. 513, 518 (1956); *Baltimore Contractors, Inc.* v. *Bodinger*, *supra*, 348 U.S. at 178; *Gospel Army* v. *Los Angeles*, 331 U.S. 543, 546 (1947); *Collins* v. *Miller*, 252 U.S. 364, 370 (1920); *St. Louis, Iron Mountain & Southern R.R.* v. *Southern Express Co.*, 108 U.S. 24, 28-29 (1883); *Bostwick* v. *Brinkerhoff*, 106 U.S. 3 (1882). Indeed, "the requirement of finality has not been met merely because the major issues in a case have been decided and only a few loose ends remain to be tied up * * *." *Republic Gas Co.* v. *Oklahoma*, 334 U.S. 62, 68 (1948). See *Canter* v. *American Insurance Co.*, 28 U.S. (3 Pet.) 306, 318 (1830); *Liberty Mutual Insurance Co.* v. *Wetzel*, 424 U.S. 737, 742-744 (1976). To the contrary, because the final judgment rule "has the support of considerations generally applicable to good judicial administration * * * [,] [o]nly in very few situations, where intermediate rulings may carry serious public consequences, has there been a departure from this requirement of finality for federal appellate jurisdiction." *Radio Station WOW, Inc.* v. *Johnson*, 326 U.S. 120, 124 (1945). See also *DiBella* v. *United States*, *supra*, 369 U.S. at 125-127. This case does not warrant an exception from the rule.

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tory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code, 69 Yale L. J. 333 (1959). The House Report accompanying the Interlocutory Appeals Act explained (H.R. Rep. No. 1667, 85th Cong., 2d Sess. 1 (1958)):

> A final order is a judgment or decree which disposes of the case in its entirety with respect to all parties and all causes of action, leaving nothing except the carrying out of the judgment or decree.

See also S. Rep. No. 2434, 85th Cong., 2d Sess. 2 (1958). The views of the Congress that amended the final judgment rule are entitled to significant weight. See *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 380-382 (1969); *FHA* v. *Darlington, Inc.*, 358 U.S. 84, 90 (1958).

The district court's order of November 30, 1977, did not conclusively decide the merits of this case. The court did rule that the Secretary has power to rescind a CDS transaction, but that was not the only argument plaintiffs presented in support of their claim for relief. Plaintiffs also contended that the Secretary had abused her discretion in failing to consider the economic impact of the STUYVESANT transaction on the Alaskan trade (A. 14-15, 60-63). The district court agreed with this contention and therefore granted plaintiffs partial summary judgment. The court expressly concluded that "the Secretary's decisions concerning the STUYVESANT were arbitrary, capricious, and an abuse of discretion in violation of 5 U.S.C. § 706(2)(A) because she failed to consider the competitive effects of her decisions" (Pet. App. 94a). Accordingly, the court remanded the case for prompt additional administrative hearings.

Plaintiffs were thus not conclusively denied the relief they sought. Rather, if they could have convinced the Secretary on remand that the STUYVESANT transaction was improper because of its economic effects or, failing that, could have demonstrated to the district court on review of the decision on remand that the Secretary had abused her discretion or had acted arbitrarily, plaintiffs would have had no cause to complain, and no reason to appeal to the court of appeals.

For this reason, the courts of appeals have emphasized time and again that an order remanding a case for further administrative proceedings—like an order referring or remanding a case to a master for an evidentiary hearing,[24] overruling a demurrer,[25] granting partial summary judgment,[26] denying a motion for summary judgment or dismissal,[27] or granting a new trial,[28] or like any other decree that

[24] See, *e.g.*, *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 254-255 (1957); *Latta* v. *Kilbourn*, 150 U.S. 524, 540 (1893); *McGourkey* v. *Toledo & Ohio Ry.*, *supra*, 146 U.S. at 545; 9 *Moore's Federal Practice* ¶ 110.08 [01], at 116 (2d ed. 1975).

[25] See, *e.g.*, *Pope* v. *Atlantic Coast Line R.R.*, 345 U.S. 379, 382 (1953).

[26] See, *e.g.*, *Liberty Mutual Insurance Co.* v. *Wetzel*, *supra*, 424 U.S. at 742-744; see 9 *Moore's Federal Practice*, *supra*, ¶ 110.08 [01], at 116.

[27] See, *e.g.*, *Catlin* v. *United States*, *supra*, 324 U.S. at 232-233. Cf. *Cobbledick* v. *United States*, *supra*; see 9 Moore's *Federal Practice supra*, ¶ 110.08 [01], at 115-116.

[28] See, *e.g.*, *Gospel Army* v. *Los Angeles*, *supra*; Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351, 356 n.44 (1961).

does not conclusively determine every issue and every prayer for relief but rather entails additional nonministerial proceedings relating to the merits of the controversy [29]—is ordinarily not a final decision. See, *e.g.*, *Freeman* v. *Califano*, 574 F.2d 264 (5th Cir. 1978); *Giordano* v. *Roudebush*, 565 F.2d 1015 (8th Cir. 1977); *Silver* v. *Secretary of the Army*, 554 F.2d 664 (5th Cir. 1977); *Bachowski* v. *Usery*, 545 F.2d 363 (3d Cir. 1976); *Ringsby Truck Lines, Inc.* v. *United States*, 490 F.2d 620, 624 (10th Cir. 1973); *Barfield* v. *Weinberger*, 485 F.2d 696 (5th Cir. 1973); *Pauls* v. *Secretary of the Air Force*, 457 F.2d 294 (1st Cir. 1972); *Dalto* v. *Richardson*, 434 F.2d 1018 (2d Cir. 1970); *United Transportation Union* v. *Illinois Central R.R.*, 433 F.2d 566 (7th Cir. 1970), cert. denied, 402 U.S. 915 (1971); *Bohms* v. *Gardner*, 381 F.2d 283 (8th Cir. 1967), cert. denied, 390 U.S. 964 (1968). See also 15 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure* § 3914, at 550-553 (1976).[30] As Mr. Justice (then Judge)

[29] See, *e.g.*, *Parr* v. *United States*, *supra*, 351 U.S. at 518-520; *Swift & Company Packers* v. *Companie Columbiana Del Caribe, S. A.*, 339 U.S. 684, 689 (1950); *Republic Gas Co.* v. *Oklahoma*, *supra*, 334 U.S. at 68; *Schoenamsgruber* v. *Hamburg American Line*, 294 U.S. 454, 456 (1935); *Alexander* v. *United States*, 201 U.S. 117 (1906).

[30] The rule illustrated by these cases is that "under normal circumstances a remand to an administrative agency [or an executive department] for further proceedings is not a final judgment within the meaning of 28 U.S.C. § 1291." *Ringsby Truck Lines, Inc.* v. *United States*, *supra*, 490 F.2d at 624. Where, however, the remand order requires only a ministerial act, such as the entry of an award of an undisputed amount

Blackmun explained in *Bohms* v. *Gardner*, *supra*, 381 F.2d at 285, involving a remand order virtually indistinguishable from that at issue here:

> The district court merely vacated the Secretary's decision and remanded the case for reconsideration and, possibly, the reception of additional evidence. It neither granted nor denied the relief

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of benefits in a social security case, the order of remand may be final. Cf. *Republic Gas Co.* v. *Oklahoma*, *supra*, 334 U.S. at 68; *McGourkey* v. *Toledo & Ohio Ry.*, *supra*, 146 U.S. at 545; *Beebe* v. *Russell*, 60 U.S. (19 How.) 283, 285 (1856). Here, of course, the proceedings on remand were clearly not ministerial in nature. The remand required a prompt hearing on the economic impact issue, following which the Secretary could well have reversed her decision to enter into the challenged transaction.

Some courts of appeals have concluded that where a remand order decides an issue that cannot effectively be reviewed after entry of a final judgment following the remand proceedings, the remand order will be considered final and appealable. See, *e.g.*, *Gueory* v. *Hampton*, 510 F.2d 1222 (D.C. Cir. 1974); *Gold* v. *Weinberger*, 473 F.2d 1376, 1378 (5th Cir. 1973); *Cohen* v. *Perales*, 412 F.2d 44, 48 (5th Cir. 1969), rev'd on other grounds *sub nom. Richardson* v. *Perales*, 402 U.S. 389 (1971). It is unnecessary to decide whether this line of decisions constitutes a correct application of the collateral order doctrine. See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949); cf. *Paluso* v. *Mathews*, 573 F.2d 4, 7-8 (10th Cir. 1978). Contrary to plaintiffs' suggestion (Alaska Reply Br. in Opp. 4 n.5), neither these cases nor the collateral order doctrine itself supports the conclusion that the November 30 order was final. It is beyond dispute that the remand order was not collateral but rather was inextricably related to the merits of plaintiffs' claim and that the court of appeals could effectively have reviewed the question of the Secretary's power to cancel the STUYVESANT's domestic trade restrictions on appeal from a final judgment entered following the decision on remand.

> the claimant seeks. The adverse agency decision so vacated may of course be reinstated in due course but it may go the other way. Until the Secretary acts on the remand we have no insight as to what his eventual decision will be. Thus, in the words of *Catlin* v. *United States*, *supra*, the litigation had not reached its end on the merits and there is more for the court to do than execute the judgment * * *.[31]

The Court's decision in *Boston & Maine Railroad* v. *United States*, 358 U.S. 68 (1958), illustrates this point. In that case, a three-judge district court held that the Interstate Commerce Commission had the power to mandate the per diem rate of compensation for use of freight cars by short-haul terminal railroads. The court nonetheless set aside the order on the merits and remanded the case to the Commission

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[31] Respondent Shell suggests (Reply Br. in Opp. 1-2) that the November 30 order conclusively denied it relief because the district court held that the Secretary has the power to rescind a CDS transaction. Thus, respondent argues, even if plaintiffs were to have prevailed on remand they could not have been assured of relief against future STUYVESANT-type transactions. This contention ignores the case and controversy requirement of Article III of the Constitution. If the Secretary had concluded on remand that the STUYVESANT transaction should not go forward, plaintiffs would have had no right to appeal since the dispute presented in *this* case—whether the STUYVESANT may operate in the Alaskan trade—would have been settled in their favor. Plaintiffs have no right to an advisory opinion on the Secretary's power under the Merchant Marine Act. If the Secretary were to decide to enter into a similar agreement (a historically rare occurrence) in the future, plaintiffs would then have the opportunity to challenge that transaction on all relevant grounds, including the Secretary's alleged lack of power.

for plenary consideration of a theretofore unexamined economic (mileage) factor. The terminal railroads sought to appeal the district court's decision regarding the Commission's power, but the Court unanimously dismissed the appeal.[32] The Court noted that appellants' claim for relief might well be satisfied on remand and that "the record now presents what is essentially only 'an interim ruling.'" 358 U.S. at 72. So too here, the district court decided a question of power adversely to plaintiffs, but it remanded for consideration of other factors that could have led to the relief plaintiffs sought. Accordingly, the November 30 order, like the district court's remand order in *Boston & Maine Railroad*, was merely an "interim ruling."

The Court's recent decision in *Liberty Mutual Insurance Co.* v. *Wetzel*, *supra*, also compels the conclusion that the November 30 order was not a final decision. *Wetzel* involved a Title VII class action seeking injunctive relief, damages, and attorneys' fees for alleged gender discrimination. The district court granted partial summary judgment for plaintiffs, fully resolving the issue of defendant's liability, but it deferred ruling on plaintiffs' claims for relief. Defendants took an immediate appeal, and the court of appeals affirmed, holding that it had jurisdiction

[32] The railroads had appealed the order pursuant to 28 U.S.C. 1253, which provides in relevant part that "any party may appeal to the Supreme Court from an order granting or denying * * * an interlocutory or permanent injunction in any civil action * * * heard and determined by a district court of three judges."

under 28 U.S.C. 1291. This Court *sua sponte* vacated and remanded with instructions to dismiss the appeal because of the absence of a final decision in the district court. 424 U.S. at 742-744. Similarly, the district court's order granting partial summary judgment in this case "finally disposed of none of [plaintiffs'] prayers for relief." *Id.* at 742. Indeed, here, unlike in *Wetzel*, the November 30 order did not even conclusively decide the issue of liability. The district court's decision whether to order injunctive relief clearly depended upon the outcome of the additional proceedings before the Secretary.[33]

Plaintiffs' response to this jurisdictional defect is a citation to *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964),[34] and *Cohen* v. *Beneficial Industrial*

[33] Even assuming that the district court did not retain jurisdiction over this case while the administrative proceedings were ongoing, there is no merit to the argument that the remand order was final because the further proceedings were to occur in an administrative forum rather than in the district court itself. The court of appeals decisions cited above do not purport to depend upon that consideration. See, *e.g.*, *Bachowski* v. *Usery*, *supra*; *Bohms* v. *Gardner*, *supra*. Moreover, this Court has held nonappealable orders that divest a particular district court of jurisdiction and mandate additional proceedings in another forum. See, *e.g.*, *Parr* v. *United States*, *supra* (change of venue); *Schoenamsgruber* v. *Hamburg American Line*, *supra* (arbitration). See also *Boston & Maine Railroad* v. *United States*, *supra*; *Beebe* v. *Russell*, 60 U.S. (19 How.) 283, 285 (1856) ("A decree is understood to be interlocutory whenever an inquiry as to matter of law or fact is directed, preparatory to a final decision.").

[34] In *Gillespie*, the Court found appealable a district court order holding that certain relatives of a deceased employee could not recover under the Jones Act, 46 U.S.C. 688. The

Loan Corp., 337 U.S. 541 (1949),[35] and the assertion that Section 1291 must be given a practical construction (Shell Reply Br. in Opp. 3 n.*; Alaska Reply Br. in Opp. 6-7). Although in a few situations the Court has accorded finality to otherwise intermediate rulings, those isolated decisions have involved district court orders either bearing serious and irremediable consequences or deciding otherwise unreviewable issues separate from the merits of the controversy. See, *e.g.*, *DiBella* v. *United States*, *supra*, 369 U.S. at 127; *Radio Station WOW, Inc.* v. *Johnson*, *supra*, 326 U.S. at 124; *Sears, Roebuck & Co.* v. *Mackey*, 351

Court stressed the "great injustice" to the relatives, whose claims were to a large extent "severable" from the remainder of the suit, in having to wait until the conclusion of the litigation before being allowed to challenge the trial judge's conclusion that they were not entitled to recover as a matter of law. 379 U.S. at 153. Here, of course, the issue of the Secretary's power under Section 506 is not severable from the merits of the case, and plaintiffs would not have suffered any harm in having to await the conclusion of the district court proceedings before seeking appellate review. In any event, *Gillespie* has been criticized as bypassing the mandatory requirements of Section 1292(b) (see Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607, 613-614 (1975)), and the Court has since limited the case to its "unique facts." *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 477 n.30.

[35] *Cohen* established the collateral order doctrine. As we have already mentioned (see note 30, *supra*), and as plaintiffs acknowledge (Alaska Reply Br. in Opp. 5 n.9), the remand order, which is entwined in the merits of this case and is fully reviewable on appeal from a final decision, is not a collateral order. See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 468-469.

U.S. 427, 441 (1956) (opinion of Frankfurter, J.); Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607 (1975). Where, as here, the interlocutory order goes to the heart of the controversy and is fully reviewable upon entry of a final judgment, there is no justification for interlocutory review. See, *e.g.*, *Liberty Mutual Insurance Co.* v. *Wetzel*, *supra*, 424 U.S. at 746; *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 468-469 (order denying certification of class action not final even if ruling spells "death knell" for suit).[33]

2. The final judgment rule is more than a technical, albeit venerable, statutory requirement. As the Court has repeatedly emphasized, important jurisprudential considerations strongly commend the rule's continued vitality and scrupulous application. See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 471-476; *Catlin* v. *United States*, *supra*, 324 U.S. at 233-234; *Cobbledick* v. *United States*, *supra*, 309 U.S. at 324-326. In general, these policy considerations militate against expanding the concept of

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[36] There is no merit to plaintiffs' suggestion (Alaska Reply Br. in Opp. 7) that even if the November 30 order was not final when entered it became final during the course of the appeal because the Secretary on remand adhered to her decision. The district court has never addressed the remand ruling and has never entered a final order. Plaintiffs each filed only one notice of appeal, and the sole basis of that appeal was the November 30 order. See Fed. R. App. P. 3(c) (notice of appeal "shall designate the * * * order * * * appealed from * * *"). Compare *Foman* v. *Davis*, 371 U.S. 178, 181 (1962); *United States* v. *Indrelunas*, 411 U.S. 216 (1973).

finality to encompass a broad spectrum of orders that do not terminate a case. Except perhaps in unique and compelling circumstances not present here (see note 30, *supra*), remand orders particularly should not be considered final and appealable.

Allowing litigants to appeal orders merely remanding a case for further administrative proceedings would unnecessarily tax the already overburdened courts of appeals. See *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 473, 475; *Borden Co.* v. *Sylk*, 410 F.2d 843, 845-846 (3d Cir. 1969); 15 C. Wright, A. Miller & E. Cooper, *supra*, § 3907, at 432-433. If, for example, the court of appeals in this case had agreed with the district court—and affirmance is by far the most usual result in an appeal [37]—another panel of the court of appeals would have been required to consider many of the same facts and legal issues on appeal from the district court's judgment following the remand. If, on the other hand, the Secretary on remand had concluded that it was inappropriate to allow the STUYVESANT to operate in the Alaskan trade, there would have been no need for plaintiffs to appeal at all. Moreover, the conclusion that remand orders are appealable not only will result in unnecessary appeals, but it will also deprive the appellate courts of the advantage of evaluating legal questions

[37] See C. Wright, *Law of Federal Courts* § 101, at 452 (2d ed. 1970). In 1978, the reversal rate in the courts of appeals was 17.3%. See *Administrative Office of the United States Courts, 1978 Annual Report of the Director* 48.

in the context of a fully developed record.[38] See 15 C. Wright, A. Miller & E. Cooper, *supra*, § 3907, at 432; Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 Yale L.J. 333, 334 (1959).[39]

Furthermore, allowance of interlocutory appeals of remand and other non-final orders as a matter of right would undoubtedly have a substantial adverse impact on the administration of justice at the district court level. Such appeals would significantly interfere with the trial judge's ability to control his calendar, would indiscriminately thrust appellate courts into the trial process, and would dramatically increase the time and expense involved in resolving disputes. See, *e.g.*, *Coopers & Lybrand* v. *Livesay*, *supra*, 437 U.S. at 473-476; *Radio Station WOW, Inc.* v. *Johnson*, *supra*, 326 U.S. at 124; *Catlin* v. *United*

[38] Here, for example, the Secretary's finding on remand that the STUYVESANT decision had no discernible effect on the plaintiffs suggests an additional argument on appeal—that the plaintiffs lack standing to bring this suit. See, *e.g.*, *Simon* v. *Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26 (1976); *Warth* v. *Seldin*, 422 U.S. 490 (1975). Although petitioners and the federal parties argued prior to remand that plaintiffs' complaint failed to allege standing, this argument was strengthened substantially by the factual findings made on remand.

[39] In this case, to be sure, the record developed on remand was available to the court of appeals because of the expedited administrative proceedings. See Pet. App. 18a n. 34. That circumstance will often not be present. In any event, even here the court of appeals lost the benefit of the district court's evaluation of the administrative record developed on remand.

States, supra, 324 U.S. at 233-234; *Cobbledick* v. *United States, supra,* 309 U.S. at 325; *Canter* v. *American Insurance Co., supra,* 28 U.S. (3 Pet.) at 318.[40] The present case is an apt illustration. The district court remanded this case to the Secretary in November 1977 with instructions to resolve the competitive effects issue expeditiously and with the expectation that plaintiffs' request for injunctive relief could be decided promptly upon review of the decision on remand. Plaintiffs' interlocutory appeal has unnecessarily delayed that process. If this Court were to reach the merits of this case and were to reverse the court of appeals' holding that the Secretary is powerless to lift the CDS restrictions permanently, the district court would then have to consider plaintiffs' challenge to the Secretary's findings on remand —more than two years after those findings were made.

In sum, even assuming that increased interlocutory review of non-final orders in some instances might "enhance the quality of justice afforded a few litigants" (*Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 473), the price would be too high to pay. As this Court has noted, "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll* v. *United States, supra,* 354 U.S. at 405. See also *United States* v. *MacDonald,* 435 U.S. 850, 857 n.6 (1978). Hence, the "incremental benefit" of advancing an occasional litigation would be far "outweighed by the impact of such an individualized * * * inquiry on the judicial system's overall capacity to administer justice." *Coopers & Lybrand* v. *Livesay, supra,* 437 U.S. at 473.[41]

[40] Plaintiffs' interlocutory appeal necessitated the filing of yet another suit in the district court to review the Secretary's decision on remand. See note 17, *supra.*

B. The District Court's Invocation Of Rule 54(b) Did Not Render The November 30 Order Appealable Under Section 1291

Prior to the adoption of the Federal Rules of Civil Procedure, only one final decision was possible in any suit, no matter how many unrelated causes of action or how many different parties were involved in the suit. See, *e.g., Sears, Roebuck & Co.* v. *Mackey,* 351 U.S. 427, 431-432 (1956); *Collins* v. *Miller,* 252 U.S. 364 (1920); *Hohorst* v. *Hamburg-American Packet Co.,* 148 U.S. 262 (1893). This "single judicial unit" theory of finality sufficed so long as most litigation involved two parties and one cause of action. The liberal federal rules regarding

[41] It is open to conjecture how much benefit, if any, increased interlocutory review would bring to individual litigants. Congress has already provided for appellate review of those interlocutory orders that, because of their substantial and irremediable impact, are most likely to warrant immediate appellate consideration. See 28 U.S.C. 1292; pages 43-48, *infra.* In most other circumstances (including the instant controversy) review following entry of a final order is adequate to protect the litigants' interests. Conversely, interlocutory appeals, if routinely available, would create the potential for one party to win a litigation by simply wearing down a financially weaker opponent. See 15 C. Wright, A. Miller & E. Cooper, *supra,* § 3907, at 432; *Bachowski* v. *Usery, supra,* 545 F.2d at 369.

joinder, interpleader, intervention, and impleader, however, encourage multiple-cause, multiple-party litigation. See *Sears, Roebuck & Co.* v. *Mackey, supra,* 351 U.S. at 432; 10 C. Wright & A. Miller, *Federal Practice and Procedure* §§ 2653-2654 (1973). By allowing the entry of a "final judgment as to one or more but fewer than all of the claims or parties," Fed. R. Civ. P. 54(b) permits the district court to alleviate the hardship that might otherwise befall a litigant whose claim or claims have been conclusively determined prior to the termination of the whole case. See, *e.g., Dickinson* v. *Petroleum Conversion Corp.,* 338 U.S. 507, 511-512 (1950).[42]

Plaintiffs contend that the November 30 order is final and appealable because the district court made the required findings under Rule 54(b). But it is beyond dispute that the district court's categorization of a particular order is not determinative of its finality. See, *e.g., Sears, Roebuck & Co.* v. *Mackey, supra,* 351 U.S. at 437; *Schwartz* v. *Compagnie General Transatlantique,* 405 F.2d 270, 274 (2d Cir. 1968); C. Wright, *Law of Federal Courts* § 101, at 454 (2d ed. 1970) (collecting cases). See also *FTC*

[42] For example, suppose A sues B seeking (1) damages for breach of a construction contract and (2) specific performance of an unrelated land sale contract. If the district court grants B's motion for summary judgment regarding claim 2, it might be unfair to make A wait until the end of trial on claim 1 before allowing him to appeal the adverse summary judgment ruling. To avoid this predicament, Rule 54(b) permits the district court to enter a final judgment regarding claim 2 if it expressly finds that "there is no just reason for delay."

v. *Minneapolis-Honeywell Regulator Co.,* 344 U.S. 206, 212 (1952). A district court may only invoke Rule 54(b) to "finalize" an order that has fully and conclusively terminated a separate and independent claim or cause of action; the rule may not "be employed to permit the appeal of a partial adjudication of the rights of one or more of the parties * * *." 10 C. Wright & A. Miller, *supra,* § 2653, at 27; see 6 *Moore's Federal Practice* ¶ 54.01 [01], at 35-36 (2d ed. 1976); *Liberty Mutual Insurance Co.* v. *Wetzel, supra,* 424 U.S. at 742-743.[43]

Accordingly, the district court's Rule 54(b) certification could not make the November 30 interlocutory order final for purposes of Section 1291. Plaintiffs' complaint asserted only one claim or cause of action arising out of one set of facts: that the Secretary could not lawfully permit the STUYVESANT to sail in the Alaskan trade for more than six months per year.[44] Without question, plaintiffs

[43] Indeed, if Rule 54(b) were construed to allow district courts to confer "finality" on interlocutory orders, it might well be invalid as an expansion of the jurisdiction of the courts of appeals. See 10 C. Wright and A. Miller, *supra,* § 2653, at 28-31; cf. Fed. R. Civ. P. 82; *Sears, Roebuck & Co.* v. *Mackey, supra,* 351 U.S. at 437-438.

[44] Insofar as plaintiffs may suggest that their requests for declaratory and injunctive relief constitute separate claims under Rule 54(b), their contention is squarely foreclosed by *Liberty Mutual Insurance Co.* v. *Wetzel, supra,* 424 U.S. at 743 & n.4. See also *Acha* v. *Beame,* 570 F.2d 57, 62 (2d Cir. 1978); *Zangardi* v. *Tobriner,* 330 F.2d 224, 225 (D.C. Cir. 1964) (declaratory and injunctive relief not separate claims).

asserted alternative legal theories to support their one "distinctly separate claim." [45] But whether the district court finally concluded that the Secretary had no power to lift the Section 506 restrictions generally or only in the circumstances presented here, it would not have affected the relief obtained by plaintiffs in this case. The November 30 order therefore conclusively determined only one of two legal theories supporting plaintiffs' single claim, and it plainly could not be appealed pursuant to Rule 54(b).[46] By the same token, the November 30 order did not completely determine any party's claims, because all parties were

[45] Advisory Committee on Rules for Civil Procedure, Note to Rule 54, 5 F.R.D. 472 (1946). See *Reeves* v. *Beardall*, 316 U.S. 283, 285 (1942) (cited with approval in the Advisory Committee Note).

[46] See, *e.g.*, *Schexnaydre* v. *Travelers Insurance Co.*, 527 F.2d 855 (5th Cir. 1976); *Public Leasing Corp.* v. *Mack Trucks, Inc.*, 16 Fed. R. Serv. 2d 472 (10th Cir. 1972); *United States* v. *Crow, Pope and Land Enterprises, Inc.*, 474 F.2d 200, 202 (5th Cir. 1973); *McNellis* v. *Merchants National Bank and Trust Company*, 385 F.2d 916 (2d Cir. 1967); *Baca Land & Cattle Co.* v. *New Mexico Timber, Inc.*, 384 F.2d 701 (10th Cir. 1967); *RePass* v. *Vreeland*, 357 F.2d 801 (3d Cir. 1966); *Backus Plywood Corp.* v. *Commercial Decal, Inc.*, 317 F.2d 339, 341 (2d Cir.), cert. denied, 375 U.S. 879 (1963); *CMAX, Inc.* v. *Drewry Photocolor Corp.*, 295 F.2d 695 (9th Cir. 1961); see 10 C. Wright and A. Miller, *supra*, § 2656, at 41, & § 2657, at 53; 6 *Moore's Federal Practice*, *supra*, ¶ 54.27 [3], at 332-335. As this Court has explained, Rule 54(b) allows the district court to control the timing of the release of final decisions in multiple-claim actions; it has no application to single-claim actions. See *Sears, Roebuck & Co.* v. *Mackey*, *supra*, 351 U.S. at 435, 438; *Liberty Mutual Insurance Co.* v. *Wetzel*, *supra*, 424 U.S. at 742-743.

to participate in the remand proceeding. Thus, there was no basis for invoking Rule 54(b), and the district court's erroneous certification did not create appellate jurisdiction under Section 1291.

Finally, the Rule 54(b) certification also failed to satisfy the specific requirements of 28 U.S.C. 1292(b). See *Liberty Mutual Insurance Co.* v. *Wetzel*, *supra*, 424 U.S. at 745-746. Section 1292(b) allows litigants to appeal interlocutory orders in exceptional circumstances. See generally Note, *Interlocutory Appeals in the Federal Courts under 28 U.S.C. § 1292(b)*, 88 Harv. L. Rev. 607 (1975); Note, *Discretionary Appeals of District Court Interlocutory Orders: A Guided Tour Through Section 1292(b) of the Judicial Code*, 69 Yale L.J. 333 (1959). In order to avoid a deluge of interlocutory appeals, however, the statute contains three mandatory conditions. H.R. Rep. No. 1667, 85th Cong., 2d Sess. 2 (1958); S. Rep. No. 2434, 85th Cong., 2d Sess. 2 (1958). None of these conditions was met here.

First, the district court did not expressly certify that its order "involves a controlling question of law as to which there is substantial ground for a difference of opinion, and that an immediate appeal from the order may materially advance the ultimate termination of the litigation." [47] Second, plaintiffs did not apply to the court of appeals within ten days of the district court's order for permission to proceed with the interlocutory appeal. See *Liberty Mutual*

[47] The district court's attempted certification under Rule 54(b) stated only that there "is no reason to delay" (A. 559).

Insurance Co. v. *Wetzel*, *supra*, 424 U.S. at 745; Note, *supra*, 69 Yale L.J. at 347; S. Rep. No. 2434, *supra*, at 3. Third, the court of appeals, which may choose not to hear an otherwise properly certified interlocutory appeal for any reason,[48] never exercised its discretion under Section 1292(b) to consider plaintiffs' appeal.

C. The District Court's Order, Which Conclusively Decided Only One Of Two Alternative Legal Theories Supporting A Claim For Injunctive Relief, Was Not Appealable Under 28 U.S.C. 1292(a)(1) As An Order Refusing An Injunction

Plaintiffs also contend (Alaska Reply Br. in Opp. 8; Shell Reply Br. in Opp. 3) that the November 30 order was appealable under 28 U.S.C. 1292(a)(1) as an interlocutory order "refusing * * * [an] injunction[]."[49] But, as we have discussed above (see pages 27-35, *supra*), the district court neither granted nor refused plaintiffs' request for equitable relief. The court merely denied plaintiffs' motion for summary judgment as to one legal theory in support of its claim for an injunction and remanded for further proceedings with regard to plaintiffs'

[48] See Note, *supra*, 88 Harv. L. Rev. at 607.

[49] We do not understand plaintiffs to suggest that they in fact appealed from the district court's order of September 30, 1977, denying their request for a preliminary injunction (see page 12, *supra*). Even assuming that plaintiffs could establish nunc pro tunc "excusable neglect," their notices of appeal would still fall outside the maximum 60-day period allowed by Fed. R. App. P. 4(a). See *George* v. *Victor Talking Machine Co.*, 293 U.S. 377 (1934). See also Fed. R. App. P. 3(c) and note 36, *supra*.

alternative legal theory. Following those proceedings, the district court would have ruled upon the request for an injunction and, in the unlikely event that that decision was not a final order, plaintiffs could then have appealed under Section 1292(a)(1).

As matters now stand, plaintiffs have never given the district court an opportunity to decide conclusively whether an injunction should issue. Hence, for the same reason that the court's order of November 30 is not final within the meaning of Section 1291 because it decided only one of the legal theories underlying a single claim, that order cannot be considered a refusal of injunctive relief within the meaning of Section 1292(a)(1). See, *e.g.*, *Cromaglass Corp.* v. *Ferm*, 500 F.2d 601, 605-609 (3d Cir. 1974) (en banc); *United States* v. *Crow, Pope and Land Enterprises, Inc.*, 474 F.2d 200 (5th Cir. 1973); *Marcel Dekker, Inc.* v. *Anselme*, 468 F.2d 607 (1st Cir. 1972); *Western Geophysical Co.* v. *Bolt Associates, Inc.*, 440 F.2d 765 (2d Cir. 1971) (Friendly, J.); 16 C. Wright, A. Miller, E. Cooper & E. Gressman, *Federal Practice and Procedure*, § 3924, at 80-81 (1977).[50] See also Note, *Appealability in the Federal Courts*, 75 Harv. L. Rev. 351, 370 (1961):

[50] Nor does the fact that the November 30 order remanded the case for further administrative proceedings regarding plaintiffs' alternative theory in support of injunctive relief render the decision appealable under Section 1292(a)(1). See, *e.g.*, *Allied Air Freight, Inc.* v. *Pan American World Airways, Inc.*, 340 F.2d 160 (2d Cir.), cert. denied, 381 U.S. 924 (1965); cf. *Chronicle Publishing Co.* v. *National Broadcasting Co.*, 294 F.2d 744 (9th Cir. 1961).

> If the court dismisses fewer than all of the theories advanced by the plaintiff to justify a permanent injunction, the situation is comparable to the denial of a motion for summary judgment. The court has not precluded the possibility that it will award the full relief sought, and it could, consistently with its prior action, grant a preliminary injunction pending disposition of the remaining counts. For the same reasons, therefore, appeal should be denied.

The Court's analysis in *Switzerland Cheese Ass'n, Inc.* v. *E. Horne's Market, Inc.*, 385 U.S. 23 (1966), strongly supports this view. In that case, plaintiffs moved for summary judgment seeking injunctive relief and damages. The district court denied the motion on the ground that there were disputed factual issues requiring a trial. Plaintiffs immediately appealed under Section 1292(a)(1), but the court of appeals dismissed for lack of jurisdiction. This Court affirmed the dismissal, noting that the order in question did not "settle * * * the merits of the [injunctive] claim." 385 U.S. at 25. The November 30 order remanding the case for further proceedings before the Secretary likewise failed to settle the merits of plaintiffs' claim for injunctive relief. See also *Gardner* v. *Westinghouse Broadcasting Co.*, 437 U.S. 478 (1978) (denial of class action certification not appealable); *Goldstein* v. *Cox*, 396 U.S. 471 (1970).[51]

[51] *Goldstein* is particularly instructive. The three-judge district court in that case denied the plaintiffs' motion for summary judgment on the issue whether the New York statute in question was unconstitutional on its face, but it did not dismiss the complaint because plaintiffs also asserted that the statute was unconstitutional as applied. Plaintiffs appealed to this Court under 28 U.S.C. 1253, which, like Section 1292(a)(1), requires "an order * * * denying * * * an * * * injunction." The Court dismissed the appeal, finding that the district court's order had neither conclusively determined the claim for permanent injunctive relief nor addressed plaintiffs' claim for a preliminary injunction. Here, too, the district court rejected plaintiffs' broad statutory attack on the Secretary's actions, but it reserved judgment on the question whether the Secretary had acted unlawfully in the circumstances of this case.

Plaintiffs' attempt to stretch Section 1292(a)(1) to cover this situation squarely conflicts with the policies that underlie that provision. Section 1292(a)(1) constitutes a narrow exception to the finality rule that is keyed to the litigants' need for immediate review of interlocutory orders bearing serious and often irreparable consequences. *Gardner* v. *Westinghouse Broadcasting Co.*, *supra*, 437 U.S. at 480; *Baltimore Contractors, Inc.* v. *Bodinger*, *supra*, 348 U.S. at 181. The November 30 order posed no threat of irreparable harm[52] and decided an issue that could be fully and effectively reviewed upon the district court's entry of a final decision. In these circumstances, it is inappropriate and unwise to expand the reach of Section 1292(a)(1), particularly since every such expansion undermines the final

[52] That the court's interlocutory decision did not threaten plaintiffs with immediate injury is evidenced by their failure to appeal the district court's denial of their motion for a preliminary injunction. Plaintiffs' ships are fully employed in the Alaskan trade and, given the conditions of that market (see page 13, *supra*), will continue to be employed in the foreseeable future.

judgment rule and threatens the courts of appeals with a "floodgate" of interlocutory appeals. See *Gardner* v. *Westinghouse Broadcasting Co.*, *supra*, 437 U.S. at 480-482; *Switzerland Cheese Ass'n, Inc.* v. *E. Horne's Market, Inc.*, *supra*, 385 U.S. at 24; *Chappell & Co.* v. *Frankel*, 367 F.2d 197, 202-205 (2d Cir. 1966) (en banc).

II.

THE MERCHANT MARINE ACT, 1936, AUTHORIZES THE SECRETARY OF COMMERCE TO RELIEVE A VESSEL THAT HAS RECEIVED A FEDERAL CONSTRUCTION SUBSIDY FROM THE TRADE RESTRICTIONS IMPOSED BY SECTION 506 OF THE ACT IN EXCHANGE FOR FULL REPAYMENT OF THE SUBSIDY

If the Court rejects the government's jurisdictional submission, it must then address the merits of this case. The question raised is whether the Secretary may relieve a vessel that has received a construction-differential subsidy of the trade restrictions imposed by Section 506 of the Act in return for full repayment of that subsidy. The court of appeals held that Section 506 impliedly precludes the Secretary from entering into such a contract despite the broad contractual powers vested in her by other provisions of the Act. But Section 506 does not require the Secretary to stand helplessly by while a new CDS-financed oil tanker lies idle and consequently defaults on millions of dollars of government guaranteed loans. Rather, the structure, legislative history and policy of the Act make clear that the Secretary has power to undo or modify a CDS transaction in order

to achieve the purposes of the Act or other important national goals. In reaching a contrary conclusion, the court of appeals incorrectly rejected a consistent and reasonable administrative interpretation that has been approved by Congress on at least two occasions.

A. Section 506 Does Not Bar The Secretary From Exercising Her Broad Powers Under The Act To Permit The STUYVESANT To Operate In The Domestic Trade On Repayment Of The CDS

1. The Merchant Marine Act grants the Secretary broad contractual authority to carry out the Title V (CDS) program. See 46 U.S.C. 1151, 1152, and 1154. Unless otherwise restricted, such authority necessarily includes the power to rescind or modify CDS contracts as well as to enter into them. See, *e.g.*, *General Dynamics Corp.* v. *United States*, 558 F.2d 985, 990 (Ct. Cl. 1977); *Nyhus* v. *Travel Management Corp.*, 466 F.2d 440 (D.C. Cir. 1972). "When Congress in an Act grants authority to contract, that authority is no less than the general authority, unless Congress has placed some limit on it." *Arizona* v. *California*, 373 U.S. 546, 580 (1963). See also *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113, 127 (1940). Particularly where, as here, the contract modification effectuates the express policy of the Act to encourage maximum usage of American owned and operated vessels,[53]

[53] See 46 U.S.C. 1101. Section 504 of the Act provides that CDS contracts "shall not restrict the lawful or proper use or operation of the vessel, except to the extent expressly required by law." 46 U.S.C. 1154. See generally pages 71-73, *infra*.

there is no justification for construing the Secretary's contractual authority in a grudging or restrictive fashion. Cf. *Mourning* v. *Family Publications Service, Inc.*, 411 U.S. 356, 371 (1973); *Permian Basin Area Rate Cases*, 390 U.S. 747, 776-779 (1968); *Gemsco, Inc.* v. *Walling*, 324 U.S. 244, 255 (1945).

The conclusion that the Secretary is empowered to modify a CDS contract does not rest on her general contractual powers alone. Under Section 207 of the Act, 46 U.S.C. 1117, the Secretary has discretion to "enter into such contracts, upon behalf of the United States * * * as may * * * be necessary to carry on the activities authorized by this chapter, or *to protect, preserve,* or *improve the collateral held by the Commission or Secretary to secure indebtedness*, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter" (emphasis supplied). Here, the STUYVESANT constituted a $27.2 million CDS program investment in an operational American merchant marine and also served as collateral for $30.2 million in government-guaranteed loans under Title XI of the Act. See page 8 & note 2, *supra*. Because of the substantial probability that the STUYVESANT would default on those loans (as well as on $40 million in additional loans 90% guaranteed by the Department of Commerce through the EDA)[54] if it

[54] See page 7 & note 11, *supra*. The total allocated construction cost of the STUYVESANT was $102.7 million. The source of these funds was (Pet. App. 8a-9a; A. 113, 542-550):

Construction-differential subsidy	$ 27.2 million
Loans guaranteed by Secretary of Commerce pursuant to Title XI	30.2 million
Loans guaranteed by EDA	40.0 million
Other funds	5.3 million
Total construction cost	$102.7 million

could not operate in the Alaskan trade, Section 207 specifically empowered the Secretary to modify the CDS contract to avoid the government's foreclosing on useless collateral.

Thus, unless some provision of the Act unequivocally withdraws the Secretary's authority to modify CDS contracts upon repayment in full of the CDS, Section 207 and the Secretary's general contractual powers constitute sufficient authority for the STUYVESANT transaction. A divided court of appeals erroneously concluded that Section 506 of the Act implicitly overrides the Secretary's broad powers under the Act. We now turn to that contention.

2. As a condition of receiving a $27.2 million CDS, petitioners promised to operate the STUYVESANT during its 20-year useful life as an American flag vessel in the foreign trade. Because CDS-financed vessels enjoy a substantial advantage over the unsubsidized domestic fleet,[55] Section 506 limits the circumstances under which such vessels may operate in the domestic trade: they may sail between

[55] The domestic fleet needs no subsidies because only American flag ships may operate in the domestic trade, whereas vessels sailing in the foreign trade compete against foreign merchant marines that generally have lower construction and operating costs. See 46 U.S.C. 883; pages 3 & 8, *supra*.

American ports only (1) as an adjunct to a foreign voyage or (2) for up to six months in any 12-month period, but only on the express consent of the Secretary. Section 506 further provides that whenever a CDS-financed vessel operates in the domestic trade it must repay a pro rata portion of the CDS. See page 6 & note 10, *supra*.

It is thus apparent that Section 506 is concerned solely with the extent and conditions of competition between the unsubsidized domestic fleet and ships that continue to enjoy the benefits of CDS financing. See H.R. Rep. No. 1029, 88th Cong., 1st Sess. 2 (1963). Although the pro rata CDS repayment requirement diminishes the competitive edge enjoyed by CDS-financed vessels, it cannot eliminate entirely the significant financial advantage held by a ship that still retains the benefit of a federal subsidy, because of the subsidized ship's overall smaller indebtedness.[56] Accordingly, Section 506 sets limits on the extent of domestic trading that a CDS-financed vessel may undertake. The section unquestionably prohibits the Secretary from allowing a subsidized vessel to operate in the domestic market for more than six months in a year.

[56] Assume, for example, that identical tankers each cost $100 million, but one (Tanker X) is built with a $50 million CDS while the other (Tanker Y) receives no subsidy. Assume further that the debt service for both ships is 10% per annum and that the Secretary has authorized Tanker X to sail in the domestic trade during its first six months at sea. Tanker X will have a substantial financial advantage over Tanker Y during this period despite the mandatory CDS repayment. Tanker X's financial costs during the six-month period will be $2.5 million (5% of $50 million) debt service plus $1.25 million (1/2 X 1/20 X $50 million) CDS repayment, or $3.75 million total, whereas Tanker Y will incur $5 million (5% of $100 million) in debt service.

But nothing in the language or logic of Section 506 suggests that the provision was intended to impose trade restrictions on a vessel that no longer retains the benefits of a CDS. Contrary to plaintiffs' contention, Section 506 does not permanently and irrevocably taint a ship built or reconstructed with CDS financing. Despite Section 506, for example, a CDS-financed ship that has operated in the foreign trade for its statutory useful life and has therefore fully amortized its CDS may thereafter be transferred to a foreign registry[57] or may operate exclusively in the domestic trade. See Decision No. B-155039, 44 Comp. Gen. 180, 183-184 (1964); H.R. Rep. No. 1029, *supra*, at 2, 5; S. Rep. No. 474, 88th Cong., 1st Sess. 2 (1963); 109 Cong. Rec. 18752 (1963) (remarks of Sen. Magnuson); note 67, *infra*.[58] And just as clearly, in our view, Section 506 does not control the trade opportunities of a vessel that has repaid its CDS in full. In other words, at the moment that petitioners repaid the subsidy, it was as if they had built the STUYVESANT without a CDS. By relinquishing its entire CDS, the STUYVE-

[57] Transfer of an American flag vessel to a foreign registry requires the approval of the Secretary. See 46 U.S.C. 808, 1181.

[58] Pub. L. No. 88-225, 77 Stat. 469, makes clear that the basis for repayment of the CDS is the undepreciated portion of the subsidy and that when the subsidy is fully amortized no repayment is required. See 46 U.S.C. 1125 Note.

SANT lost completely the financial advantage enjoyed by CDS-financed ships temporarily operating in the domestic trade.[59] The STUYVESANT transaction thus is significantly different from the kind of temporary transfers addressed by Section 506.

Plaintiffs, recognizing that Section 506 does not apply to ships that are not subsidized and that it was not enacted to limit competition within the domestic fleet, strain to show that the STUYVESANT continues to benefit from its erstwhile federal financing. They contend that the language of Section 506 should be stretched to encompass the STUYVESANT's circumstances because its initial receipt of CDS financing enabled petitioners to speculate on the world tanker market at the government's expense. There is no support in the record for this speculation. Since 1936 the Secretary has released a vessel from its Section 506 restrictions on only a handful of occasions. It is thus most unlikely that petitioners participated in the CDS program on the assumption that they would be permitted to obtain a permanent release at some future date.[60] Indeed, because the STUYVESANT was

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[59] See note 56, *supra*. Petitioners did have interest-free use of the CDS money between 1972 and 1977. Although the Secretary previously concluded that this advantage was de minimis and that she is not statutorily required to recoup the interest (A. 592-596), she has now decided to seek a reasonable amount of interest for that period if the Court upholds her power to enter into the CDS transaction.

[60] Needless to say, if in a particular case the evidence showed that the owners of a vessel applied for a CDS with the expectation of repaying the subsidy and transferring to

built to operate in the foreign trade, it is possible that the ship will be at a slight competititive disadvantage in the domestic trade because its construction entailed more expensive features required for transoceanic sailing.[61]

In short, the net effect of the STUYVESANT transaction is that an unsubsidized vessel has entered the domestic market. Section 506 was not meant to control the trading opportunities of such a vessel or to stifle increased competition among unsubsidized ships in that market.

B. The Legislative History Of The Merchant Marine Act Demonstrates That Congress Intended To Allow The Secretary To Relieve A Vessel Of The Section 506 Trade Restrictions On Repayment Of The CDS

1. *The Original Act.* The Merchant Marine Act, 1936, was the product of dissatisfaction with prior federal programs designed to encourage development of a modern merchant marine in this country.[62] In March 1935, President Roosevelt sent a message to

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the domestic trade, that would be a substantial factor for the Secretary to consider in determining whether to approve the transaction.

[61] For example, ships built for overseas voyages might be equipped with larger or special appliances unnecessary for operations in the domestic trade.

[62] The low interest loan and ocean mail contract programs of the Merchant Marine Act of 1928, ch. 675, 45 Stat. 689, had been badly and corruptly administered and had had no cognizable effect on the construction of new merchant ships to replace the obsolete fleet left over from World War I. See S. Rep. No. 898, 74th Cong., 1st Sess. 3-36 (1935); H.R. Doc. No. 118, 74th Cong., 1st Sess. 3-19 (1935) (Report of the Postmaster General).

Congress outlining the problems of the existing fleet and urging new legislation to ensure an adequate merchant marine. H.R. Doc. No. 118, 74th Cong., 1st Sess. 1-3 (1935). Following an extensive investigation, a special Senate committee led by Senator Hugo Black reported its findings and recommendations. See generally S. Rep. No. 898, 74th Cong., 1st Sess. (1935). The Black Report called for a program of construction subsidies to be paid directly to American shipyards in order to equalize construction costs in the United States with the otherwise lower costs in foreign shipyards. *Id.* at 43-44. It further recommended that no subsidized vessel be permitted to operate in the domestic trade

> except with the consent of the agency, and the agency should specifically be denied authority to consent to such operation until there shall have been repaid an amount which bears the same proportion to the construction subsidy theretofore paid as the remaining economic life of the vessel bears to its entire economic life.[63]

Id. at 44.[64]

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[63] Between 1936 and 1950, an independent agency (the United States Maritime Commission) administered the CDS program. Since 1950 the Department of Commerce through the Maritime Administration has run this program. The legislative history therefore contains varying references to the operating authority of the subsidy program. For clarity, we consistently refer to "the Secretary" rather than to the various agencies.

[64] Similarly, President Roosevelt's Committee on Shipping Policy recommended enactment of a subsidy program, "but if such [subsidized] ships are entered in the [domestic] trade, the owner should be required to reimburse the Government pro rata based on the life of the ship." H.R. Doc. No. 118, *supra*, at 22.

The events leading to the passage of the 1936 Act reflect Congress' acceptance of the Black Report's recommendation regarding the repayment of construction subsidies. In April 1935, identical bills were introduced in the Senate and the House of Representatives, expressly providing that ships that had received construction subsidies could permanently operate in the domestic market upon pro rata repayment of the subsidy. S. 2582, 74th Cong., 1st Sess., Section 504, 79 Cong. Rec. 5617, 5620 (1935); H.R. 7521, 74th Cong., 1st Sess., Section 504, 79 Cong. Rec. 5721 (1935). The House subsequently passed an amended version of the bill, which also provided for a proportional repayment of the subsidy as a condition of operating in the domestic trade without restrictions. H.R. 8555, 74th Cong., 1st Sess., Section 506 (1935). See 79 Cong. Rec. 10288, 10289 (1935); H.R. Rep. No. 1277, 74th Cong., 1st Sess. 22 (1935). The Senate, however, failed to approve this version, apparently in part because the bill as drafted too easily permitted the temporary transfer of subsidized vessels to and from the domestic market. See S. Rep. No. 1721, 74th Cong., 2d Sess. 15 (1936); H.R. Rep. No. 1277, *supra*, at 35 (minority views); *Proposed Merchant Marine Act, 1935: Hearings on S. 2582 Before the Senate Comm. on Commerce*, 74th Cong., 1st Sess. 151-152 (1935); *Proposed Merchant Marine Act, 1936: Hearings on S. 3500, S. 4110,*

and S. 4111 Before the Senate Comm. on Commerce, 74th Cong., 2d Sess. 57-58 (1936).

The following year, Senators Copeland and Guffey introduced new bills designed to permit permanent transfers to the domestic market in exchange for pro rata repayment of the subsidy but to limit the extent of temporary domestic trading that could be carried on by subsidized vessels. S. 3500, 74th Cong., 2d Sess., Section 506 (1936); S. 4110, 74th Cong., 2d Sess., Section 27 (1936). See 80 Cong. Rec. 48, 2900, 4367 (1936). As Senator Guffey explained:

> Section 27 * * * prohibits the operation of a vessel constructed with the aid of a subsidy for foreign service to be operated jointly in the foreign service and in the intercoastal service. Provision is made, however, for the transfer of such vessel from a foreign service to the intercoastal service if in the opinion of the Commission the conditions warrant such transfer, provided that the owner will immediately pay to the Commission the unamortized portion of said subsidy. This section also provides that the Commission may permit the transfer of a vessel constructed for the foreign service with the aid of a subsidy to the intercoastal service temporarily, for a period not to exceed 3 months, provided an actual emergency exists.

Proposed Merchant Marine Act, 1936: Hearings on S. 3500, S. 4110 and S. 4111 Before the Senate Comm. on Commerce, 74th Cong., 2d Sess. 133 (1936); see also *id.* at 124 (explanation of Sen. Copeland's bill).

Congress essentially adopted Senator Guffey's proposal as Section 506 of the Merchant Marine Act, 1936. Section 506 as originally enacted allowed emergency transfers of subsidized vessels to the domestic trade for up to three months. It also allowed permanent transfers, conditioned on the vessel owner's agreement to pay "an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid * * * as the remaining economic life of the vessel bears to its entire economic life" (ch. 858, Section 506, 49 Stat. 1999).[65]

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[65] Section 506, as originally enacted, provided:

> It shall be unlawful to operate any vessel, for the construction of which any subsidy has been paid pursuant to this title, other than exclusively in foreign trade, or on a round-the-world voyage or a round voyage from the west coast of the United States to a European port or ports or a round voyage from the Atlantic coast to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at an island possession or island territory of the United States, unles the owner of such vessel shall receive the written consent of the [Maritime] Commission so to operate and prior to such operation shall agree to pay to the Commission, upon such terms and conditions as the Commission may prescribe, an amount which bears the same proportion to the construction subsidy theretofore paid or agreed to be paid (excluding costs of national-defense features as hereinbefore provided), as the remaining economic life of the vessel bears to its entire economic life. If an emergency arises which, in the opinion of the Commission, warrants the temporary transfer of a vessel, for the construction of which any subsidy has been paid pursuant to this title, to service other than exclusive operation in foreign trade, the Commission may permit such transfer: Provided, That no

Hence, the Act as passed in 1936 expressly authorized the kind of transaction challenged here.

2. *The 1938 Amendments.* Although Section 506 of the 1936 Act clearly provided that a subsidized vessel could operate permanently in the domestic trade on repayment of the unamortized portion of its subsidy, the section was ambiguous with regard to whether the temporary transfer of such a vessel to the domestic trade also required a proportional subsidy repayment. Accordingly, in 1938 Congress amended Section 506, producing essentially the current version of that statute. See ch. 600, Section 18, 52 Stat. 958. The new Section 506 extended the maximum period of temporary domestic operations to six months and eliminated the requirement that such trading be predicated on the existence of an emergency. The amended version also removed the uncertainty that had arisen under the original Section 506 by requiring a pro rata repayment of the subsidy whenever a CDS-financed vessel operates in the domestic trade.

Unfortunately, in clarifying the latter point, the 1938 amendments also deleted the language that expressly authorized permanent domestic trading by a vessel that had repaid its unamortized CDS. Relying on the ambiguous statement of a single witness at a congressional hearing on the proposed amendments, a majority of the court of appeals concluded that this omission reflected Congress' intent

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operating differential subsidy shall be paid during the duration of such temporary or emergency period, and such period shall not exceed three months.

to preclude the Secretary under any circumstances from permanently releasing a vessel from the trade restrictions imposed by Section 506 (Pet. App. 24a-27a). However, other portions of the legislative history accompanying the 1938 amendments demonstrate that the deletion was inadvertent and that Congress did not intend to limit the Secretary's power in this regard.

The statement primarily relied on by the court of appeals was made by Chairman Joseph P. Kennedy of the United States Maritime Commission. Chairman Kennedy testified before a House Committee that "Section 506 has been entirely rewritten to remove ambiguities and confusion" in the 1936 language. *Amending Merchant Marine Act, 1936: Hearings on H.R. 8532 Before the House Comm. on Merchant Marine and Fisheries*, 75th Cong., 2d & 3d Sess. 8 (1937). Chairman Kennedy then outlined in general terms the existing and proposed statutes, alluding to the new provision requiring a pro rata CDS repayment in case of a temporary transfer but never once directly addressing the Secretary's power to release a subsidized ship from its trade restrictions on a permanent basis. *Id.* at 8-9. Thus, there is no warrant for the court of appeals' conclusion that the ambiguity to which Chairman Kennedy referred involved the question of permanent waivers. Indeed, that conclusion is particularly unjustified because the original version of Section 506 contained no ambiguity concerning *permanent* CDS releases—it explicitly allowed them and explicitly required repayment of the unamortized construction subsidy—

whereas the statute contained an obvious ambiguity with regard to pro rata repayments in the case of *temporary* emergency releases.[66]

This assessment of Chairman Kennedy's testimony and the intent of Congress in passing the 1938 amendments is bolstered by the legislative reports on the amendments, which explain that the changes in Section 506 merely clarified the conditions of temporary transfers to the domestic service and that "[n]o fundamental change in the original purpose of [Section 506] has been effected." H.R. Rep. No. 2168, 75th Cong., 3d Sess. 21 (1938); see S. Rep. No. 1618, 75th Cong., 3d Sess. 12-13 (1938). See also note 66, *supra*. In light of the clear language and legislative history of the original Section 506, which empowered the Secretary to allow a subsidized vessel to operate permanently in the domestic trade in exchange for repayment of the CDS, it is exceedingly unlikely that Congress would have eliminated that power without extended comment, much less that it would have described such a change as not "fundamental."

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[66] Furthermore, at least one industry spokesman did not share the view ascribed to Chairman Kennedy by the court of appeals that amended Section 506 would drastically limit the domestic trading opportunities of a subsidized vessel. See *Amending Merchant Marine Act, 1936: Hearings on H.R. 8532 Before the House Comm. on Merchant Marine and Fisheries, supra,* at 105-106; and *Amending the Merchant Marine Act of 1936: Hearings on S. 3078 Before the Senate Comms. on Commerce and Education and Labor,* 75th Cong., 2d Sess. 44 (1937) (recommending that Section 506 be amended to prohibit all domestic trading by both "subsidized vessels and vessels which have at any time been subsidized.").

Finally, the court of appeals' reading of the 1938 amendments of Section 506 is further refuted by Congress' simultaneous amendment of Section 207 of the Act to emphasize the Secretary's broad contractual powers under that provision, particularly where the government's interest in collateral is at risk. See S. Rep. No. 1618, *supra*, at 4-5; H.R. Rep. No. 2168, *supra*, at 17. The House Report confirms that, "[u]nder the Act, the Maritime Commission has all the general and implied powers of a business corporation" (*ibid.*). It is difficult to accept the notion that Congress in 1938 meant to enhance the Secretary's contractual powers to accomplish the goals of the Act while simultaneously (and without comment) intending to strip the Secretary of the basic authority to amend or terminate CDS contracts when conditions warranted such action.[67]

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[67] Additional support for the government's position may be gleaned from the legislative history of the 1963 amendments to the Act. In response to a bill that would have expressly declared that Section 506 did not limit the trading opportunities of a subsidized ship beyond its statutory useful life, the Department of Commerce informed Congress that even under the original Section 506 "the obligation to repay construction differential subsidy for operation in domestic trade was intended to be, and should be, terminated at the end of the economic lives of the vessels." *Coast Guard, Subsidy Refunds and Extra Costs of Allocation of Vessel Construction Contracts: Hearings on S. 1036, S. 1194, S. 1263 and S. 1172 Before the Senate Subcomm. on Merchant Marine and Fisheries of the Senate Comm. on Commerce,* 88th Cong., 1st Sess. 59 (1963); *Legislative Proposals of the Subsidized Lines: Hearings on H.R. 83, H.R. 6814, H.R. 82, H.R. 3117 and H.R. 6813 Before the House Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries,* 88th Cong., 1st Sess. 118 (1963). The proposed section

C. The Elimination Of Domestic Trade Restrictions In Return For Repayment Of The CDS Is Supported By The Secretary's Consistent Construction Of The Act, Which Has Been Approved By Congress

It is a basic principle of statutory interpretation that " 'the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *.' " *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). See also *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965). The Secretary has consistently interpreted the Act as conferring authority to enter into STUYVESANT-type transactions. This interpretation, as demonstrated above, is supported by the language and the legislative history of the statute, and the court of appeals therefore erred in failing to defer to it. The court's substitution of its views for that of the Secretary is particularly inappropriate because Congress has indicated its awareness and approval of the administrative construction of the Act on a number of occasions and, indeed, has passed subsequent legislation based on that construction. See *Lorillard* v. *Pons*, 434 U.S. 575, 580-581

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was deleted from the final bill (Pub. L. No. 88-225, 77 Stat. 469 (1963)) on the understanding that Section 506 did not restrict a subsidized ship from freely operating in the domestic trade once its subsidy had been fully amortized. See 109 Cong. Rec. 18752 (1963) (remarks of co-sponsor Sen. Magnuson); H.R. Rep. No. 1029, 88th Cong., 1st Sess. 2, 5 (1963); S. Rep. No. 474, 88th Cong., 1st Sess. 2 (1963). See also H.R. Conf. Rep. No. 91-1555, 91st Cong., 2d Sess. 7 (1970); S. Rep. No. 91-1080, 91st Cong., 2d Sess. 63 (1970).

(1978); *NLRB* v. *Bell Aerospace Co.*, 416 U.S. 267, 274-275 (1974); *Red Lion Broadcasting Co.* v. *FCC*, *supra*, 395 U.S. at 380-382.

1. *The Administrative Construction.* The question of permanently relieving a ship of its CDS restrictions first arose in 1964. At that time, Grace Line, Inc., petitioned the Secretary for leave to operate two of its vessels in the domestic trade conditioned on repayment of the unamortized portion of the vessels' CDS.[68] The Acting General Counsel of the Maritime Administration issued an opinion stating that a vessel could in effect accelerate its reentry into the domestic trade upon expiration of its statutory useful life by repaying its subsidy and that Section 506 did not preclude such a transaction (A. 350-358). The Secretary then requested the views of the Comptroller General. In September 1964, the Comptroller General concurred in the conclusion that, if the Secretary consents, a subsidized vessel may operate permanently in the domestic trade as long as it has repaid

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[68] The two vessels had been converted from cargo to container ships with the aid of a CDS in 1958. Because the CDS program applies to both construction and reconditioning of American flag vessels (see note 3, *supra*), there is no statutory basis for the court of appeals' distinction between the *Grace Line* case and the circumstance of the STUYVESANT (Pet. App. 30a-31a). As we discuss below (see pages 73-75, *infra*), the court's suggestion that subsidized construction somehow differs from subsidized reconditioning with regard to the investment decisions of domestic shipbuilders is unrealistic and misconstrues the policies of the Act. We note here, however, that under plaintiffs' theory of the case a putative shipbuilder in 1958 would have been equally "misled" as to the future operations of the Grace Line vessels whether those vessels were constructed or reconstructed under the CDS program.

the unamortized portion of its subsidy. Decision No. B-155039, 44 Comp. Gen. 180 (1964). The Comptroller General found that a release-repayment transaction would not violate the letter or the spirit of Section 506 because the owner of the vessel would then be "in the same position as if he had paid the full domestic price of the vessel." *Id.* at 184.

The Secretary has subsequently adhered to the *Grace Line* decision in a number of instances, including, of course, the case of the STUYVESANT. In 1976 and 1977, for example, the Secretary conditionally approved the operation of two vessels in the domestic trade upon repayment in full of their CDS (A. 165).[69] And in 1977, the Secretary accepted a CDS repayment from two other vessels then under construction so that those vessels could operate exclusively between two foreign countries, operations otherwise barred by Section 506 (A. 165). In sum, although the authority has been rarely invoked, the Secretary and her predecessors have consistently concluded that they have the power to modify or terminate a CDS contract (including the trade restrictions imposed by Section 506) in exchange for repayment of the unamortized portion of the CDS.[70]

[69] The condition never arose, however, because the Virgin Islands trade in which those vessels operated was held to be foreign commerce in *American Maritime Ass'n* v. *Blumenthal*, 590 F.2d 1156 (D.C. Cir. 1978), cert. denied, No. 78-1287 (May 14, 1979). See 46 U.S.C. 877.

[70] The court of appeals erroneously relied (Pet. App. 32a-33a) on a 1970 legal memorandum of the General Counsel of the Maritime Administration (A. 359-363) to establish an inconsistency in the administrative construction of the Act. That memorandum recommended against including an automatic waiver provision in a CDS contract so as not to bind a future exercise of discretion by the Secretary and the Maritime Subsidy Board. The opinion does not suggest that the Secretary, in appropriate circumstances, lacks power to release a vessel from the Section 506 restrictions; it merely counsels against an advance agreement to allow an automatic release. The memorandum's concern with future exercises of such power clearly reflects the view that the Secretary may enter into STUYVESANT-type transactions, in return for adequate consideration, in order to accomplish the purposes of the Act.

2. *Congressional Approval.* Congress has expressly ratified the Secretary's construction of the Act on several occasions. Most notably, in 1972 Congress amended Title XI of the Act, 46 U.S.C. 1271 *et seq.*, to provide that the Secretary could issue bonds and guarantee private financing that aids in "the repayment to the United States of any amount of construction-differential subsidy * * *." Federal Ship Financing Act of 1972, Pub. L. No. 92-507, Section 1104 (a)(3), 86 Stat. 911, 46 U.S.C. 1274(a)(3). The bill as originally introduced authorized the Secretary to finance

> the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to title V of this Act, as amended, in order to release such vessel from all restrictions imposed as a result of the payment of such construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions * * *.

H.R. 9756, 92d Cong., 1st Sess., Section 3 (1971). See also *Merchant Marine Miscellaneous Part 2: Hearings on Ship Mortage Insurance H.R. 9756 Before the House Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries*, 92d Cong., 1st Sess. 225, 228 (1971). Thereafter, the Department of Commerce informed Congress that although the Secretary could arrange a permanent release from the trade restrictions of Section 506 on repayment of the unamortized CDS, such a transaction had occurred only once before. The Department therefore recommended that the proposed statute be amended to allow Title XI financing for the repayment of a CDS occasioned by either a temporary or a permanent transfer to the domestic service. See *id.* at 219; H.R. Rep. No. 92-688, 92d Cong., 1st Sess. 17 (1971).

Congress subsequently enacted the bill in accordance with the Department's suggestions. See 46 U.S.C. 1274(a)(3), 1274(b)(2). Referring to the *Grace Line* decision, the House Report clearly explains that the bill was intended to facilitate CDS repayments in the event of temporary domestic trading as well as in the more unusual circumstances of permanent releases. See H.R. Rep. No. 92-688, *supra*, at 9-10.[71] See also S. Rep. No. 92-1137, 92d

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[71] The House Report states:

> Paragraph (3) is new. As introduced, the language of this paragraph would have permitted the Secretary of Commerce to guarantee an obligation which aids in financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy pursuant to Title V, "in order to release such vessel from all restrictions imposed as a result of the payment of such construction-differential subsidy, when such repayment is permitted by the Secretary of Commerce after considering the competitive effect of releasing such vessel from such restrictions." In the entire history of the administration of the 1936 Act there has been only one instance where a construction-differential subsidy repayment, authorized by the Secretary under very special circumstances, could have called into play the provisions of this paragraph. Your Committee questions the desirability of general legislation to deal with such an unusual situation, and feels that Title XI assistance should be extended to all instances of subsidy repayments under Title V, so as to include the relatively frequent situation of repayments under the first sentence of section 506 of the Act. Your Committee has therefore amended the legislation by deleting the language quoted above. This paragraph in Title XI does not in any way extend or affect the application of Title V of the Act.

[72] See also 46 U.S.C. 1274(b)(2), which provides that the guarantee may not exceed 87½% of the actual cost of the ship in the case of domestic vessels or vessels that were "built with the aid of construction-differential subsidy and said subsidy has been repaid * * *."

[73] Even prior to 1972, Congress had at least implicitly approved the Secretary's construction of the Act. In accordance with the Reorganization Act of 1949, ch. 226, 63 Stat. 203, the President delivered Reorganization Plan No. 21 of 1950, 64 Stat. 1273, to Congress for its approval. (That is, such a plan may be vetoed by either House within 60 days

Cong., 2d Sess. 9 (1972); 118 Cong. Rec. 2902 (1972) (remarks of Rep. Garmatz).[72] Congress thus not only adopted the Secretary's construction of the Act, but it also passed legislation based in part on that construction.[73]

Moreover, just last year Congress again confirmed that a subsidized vessel may repay its CDS in order to operate permanently in the domestic trade. Congress amended the Merchant Marine Act to extend Title XI guarantees to the slower domestic fleet ships that ply the Great Lakes. See Pub. L. No. 95-505, 92 Stat. 1755. The House Report on the amendment described the Great Lake vessels as ones that are "nonsubsidized (or [have] repaid a construction-differential subsidy)." See H.R. Rep. No. 95-1528, 95th Cong., 2d Sess. 2 (1978).[74] The Report also remarked, without a note of disagreement, that:

> the Department of Commerce not only supported enactment of [the bill] to extend the eligibility for [Title XI] guarantees to Great Lake vessels constructed without construction-differential subsidy (CDS) *or constructed with CDS that has*

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of receipt). Plan No. 21 specifically transferred "[t]he functions with respect to making, amending, and *terminating* subsidy contracts * * * under the provisions of Titles V, VI and VIII * * * of the Merchant Marine Act, 1936" to the Federal Maritime Board (64 Stat. 1274) (emphasis supplied). See also Reorganization Plan No. 7 of 1961, 75 Stat. 840, 842 (transferring same functions to Maritime Administrator).

[74] The court of appeals suggested (Pet. App. 45a) that the 1972 amendments did not constitute congressional ratification of the Secretary's position because a vessel might repay its CDS for reasons other than a desire to operate in the domestic trade. That argument ignores Congress' express reference to *Grace Line* and the clear language of Section 1274(b)(2), see note 72, *supra*. In any event, the 1978 amendments clearly involve repayment for the purpose of operating in the domestic trade, and Congress then reiterated its belief that such transactions are lawful under the Act.

> *been repaid*, but would have no objection to an amendment to section 1104(b)(2) that would make the [Title XI] guarantees available to all vessels constructed without CDS *or with CDS that has been repaid.*

Ibid. (emphasis supplied).

In sum, given Congress' repeated understanding and acceptance of the Secretary's view of the Merchant Marine Act, the court of appeals was justified in departing from that interpretation only if the language or legislative history of the Act unequivocally demonstrated that the Secretary is powerless to modify or terminate a CDS contract. Because the language and legislative history of the original Act and the 1938 amendments cannot bear that burden, and indeed strongly suggest that Congress intended to allow reverse-CDS transactions, the court of appeals erred.

D. The STUYVESANT Transaction Accords With The Policies Of The Merchant Marine Act

Congress has declared that the overriding purpose of the Merchant Marine Act is to foster the development and maintenance of an American merchant marine fleet built by domestic shipyards and operated by American crews. See 46 U.S.C. 1101; H.R. Rep. No. 1277, *supra*, at 1, 17-20. The holding of the court of appeals undermines those policies. It will force an American flag vessel to remain idle and guarantee that its shipyard ceases operations.[75] As

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[75] Subsequent to the Secretary's decisions in this case, the shipyard closed its operations at least temporarily. See *N.Y.*

a result, employment opportunities for American seamen and shipyard employees will be significantly reduced. Moreover, the decision below will undoubtedly diminish the attractiveness of the CDS program,[76] thereby ultimately limiting the overall amount of American shipbuilding and, consequently, this country's military, economic, and political strength. See H.R. Doc. No. 118, *supra*, at 1-3 (address of Pres. Roosevelt); H.R. Rep. No. 1277, *supra*, at 1-4, 11-13.

Furthermore, the court of appeals' decision conflects with Congress' desire to ensure a viable merchant marine in the United States by giving the administrator of the Act

> a considerable amount of discretion in the solution of its problems. This discretion is necessary since many questions will require prompt treatment. Shipping is a business of a highly competitive and constantly changing nature * * *.

Times, May 9, 1979, Section A, at 1. Plaintiffs, however, have never contested the Secretary's finding that "failure to approve the [STUYVESANT's application] would jeopardize continued operation of the Seatrain Shipbuilding Corporation" (A. 34) The Secretary's action was in accordance with Congress' intent that she "take into consideration the conditions of unemployment and the needs and requirements of all shipyards in the country * * *." H.R. Rep. No. 2168, *supra*, at 11; see also *id.* at 19.

[76] The distinct possibility, in light of the court of appeals' ruling, that a vessel, once subsidized, will be denied available employment in the domestic trade and will be forced to default on its loans necessarily lessens the appeal of the CDS program.

S. Rep. No. 713, 74th Cong., 1st Sess. 4 (1935). See *States Marine International, Inc.* v. *Peterson, supra*, 518 F.2d at 1079. The existence of an energy crisis in this country (indeed the world) is news to none. Yet, despite the Secretary's finding that there is insufficient tonnage in the Alaskan oil trade (A. 566-599), plaintiffs urge the Court to hold that the Secretary is powerless to transfer to the Alaskan service a large, modern tanker that has repaid its CDS in full. In addition, plaintiffs and the court of appeals have ignored the Secretary's duty under Section 207 of the Act to protect the government's direct financial interests—here, over $100 million.[77]

Despite these considerations, the court of appeals stated that the STUYVESANT transaction posed a "risk of harm to the overall and long-term policies of the Merchant Marine Act" (Pet. App. 49a). In the court's view, the Act creates two immutably sepa-

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[77] The government granted a $27.2 million CDS to the STUYVESANT and a $5 million (EDA) loan to petitioners. In addition, the Department of Commerce through the Maritime Administration and the EDA guaranteed a total of $112.2 million in other loans in connection with the STUYVESANT and the Brooklyn Navy Yard conversion. See pages 7-8 and note 54, *supra*. Respondent Shell has erroneously suggested (Br. in Opp. 11) that the government has no financial interest in these transactions because of guarantees by Seatrain Lines, Inc., petitioners' parent company. The government is unaware of any such guarantees regarding the STUYVESANT loans, and the record discloses none. Indeed, the Secretary specifically found that the STUYVESANT transactions were necessary to protect the government's financial interests, and plaintiffs never disputed that finding during the administrative proceedings or in the district court (A. 34 and 570 n.5).

rate fleets, one operating in the domestic trade and one in the foreign, and "[p]ayment of the subsidy stamps indelibly the character of the ship then and thereafter" (Pet. App. 14a) and marks "the vessel's permanent dedication to U.S. foreign trade" (*id.* at 16a). But Congress has repeatedly declined to create absolute barriers between unsubsidized and subsidized ships despite the requests of domestic shipping companies. See, *e.g.*, note 66, *supra*. To the contrary, Congress has clearly provided that subsidized vessels may operate in the domestic trade temporarily and on complete amortization of the CDS. Moreover, although we do not dispute that Section 506 sets limits upon the duration of competition between subsidized and unsubsidized vessels, the STUYVESANT is no longer subsidized, and its operation in the Alaskan trade cannot reasonably be described as unfair.[78]

Nor is there any merit to the court's assertion (Pet. App. 49a-51a) that the Secretary's action will substantially diminish investment in the domestic fleet. At least since the *Grace Line* decision in 1964, the shipping industry has been on notice of the potential for transferring a CDS ship to the domestic service upon repayment of its subsidy. See, *e.g.*, *Merchant Marine Miscellaneous Part 2: Hearings on Ship Mortgage Insurance H.R. 9756 Before the House*

[78] For this reason, plaintiffs arguably do not even fall within the "zone of interest" protected by Section 506 of the Merchant Marine Act. See *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150 (1970).

Subcomm. on Merchant Marine of the House Comm. on Merchant Marine and Fisheries, 92d Cong., 1st Sess. 225 (1971) (statement of James J. Reynolds, President, American Institute of Merchant Shipping). Nevertheless, as the Secretary observed in the administrative proceedings (A. 587), plaintiffs have never cited one "instance of a decision not to build new ships in the domestic trade nor any plan to build which was scrapped" as a result of that decision or the instant controversy. Given the small number of STUYVESANT-type transactions and the magnitude of other relevant factors, it is difficult to believe that that concern is of any importance to the investment decision.[79]

At base, plaintiffs seek a monopoly over the Alaskan trade—a result completely at odds with the purpose of Congress in passing the Merchant Marine Act. Indeed, Section 504 of the Act specifically precludes the Secretary from "restrict[ing] the lawful or proper use or operation of the vessel, except to the extent expressly required by law." 46 U.S.C. 1154. See also H.R. Rep. No. 1277, *supra*, at 1; S. Rep. No. 1618, *supra*, at 10. Because neither Section 506 nor any other provision of the Act was intended to protect domestic shippers from competition by other unsubsidized vessels, the court of appeals erroneously concluded that the STUYVESANT cannot operate in the Alaskan trade.

[79] As Judge Bazelon observed (Pet. App. 59a n.16), plaintiffs' contrary contention ignores the fact that "the builder of an unsubsidized vessel has no way of knowing how many other unsubsidized vessels might be built in the future."

CONCLUSION

The judgment of the court of appeals should be vacated and remanded with instructions to dismiss plaintiffs' appeal for lack of jurisdiction. If the Court reaches the merits, the judgment of the court of appeals should be reversed.

Respectfully submitted.

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APPENDIX

1. 28 U.S.C. 1291 provides in relevant part:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States * * *.

2. 28 U.S.C. 1292 provides in relevant part:

> (a) The courts of appeals shall have jurisdiction of appeals from:
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> (1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> * * * *
>
> (b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten

days after the entry of the order: *Provided, however,* That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order.

3. Section 101 of the Merchant Marine Act, 1936 ("the Act"), 46 U.S.C. 1101, provides:

> It is necessary for the national defense and development of its foreign and domestic commerce that the United States shall have a merchant marine (a) sufficient to carry its domestic water-borne commerce and a substantial portion of the water-borne export and import foreign commerce of the United States and to provide shipping service essential for maintaining the flow of such domestic and foreign water-borne commerce at all times, (b) capable of serving as a naval and military auxiliary in time of war or national emergency, (c) owned and operated under the United States flag by citizens of the United States, insofar as may be practicable, (d) composed of the best-equipped, safest, and most suitable types of vessels, constructed in the United States and manned with a trained and efficient citizen personnel, and (e) supplemented by efficient facilities for shipbuilding and ship repair. It is declared to be the policy of the United States to foster the development and encourage the maintenance of such a merchant marine.

4. Section 207 of the Act, 46 U.S.C. 1117, provides in relevant part:

> The Federal Maritime Commission and the Secretary of Commerce may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its or his discretion, be necessary to carry on the activities authorized by this chapter, or to protect, preserve, or improve the collateral held by the Commission or Secretary to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. * * *

5. Section 501 of the Act, 46 U.S.C. 1151, provides:

> (a) Any proposed ship purchaser who is a citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in the construction of a new vessel to be used in the foreign commerce of the United States. No such application shall be approved by the Secretary of Commerce unless he determines that (1) the plans and specifications call for a new vessel which will meet the requirements of the foreign commerce of the United States, will aid in the promotion and development of such commerce, and be suitable for use by the United States for national defense or military purposes in time of war or national emergency; (2) if the applicant is the proposed ship purchaser, the applicant possesses the ability, experience, financial resources, and other qualifications necessary for the operation and maintenance of the proposed new vessel, and (3) the granting of the aid applied for is reasonably

calculated to carry out effectively the purposes and policy of this chapter. The contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price shall not restrict the lawful or proper use or operation of the vessel except to the extent expressly required by law. The Secretary of Commerce may give preferred consideration to applications that will tend to reduce construction-differential subsidies and that propose the construction of ships of higher transport capability and productivity.

(b) The Secretary of Commerce shall submit the plans and specifications for the proposed vessel to the Navy Department for examination thereof and suggestions for such changes therein as may be deemed necessary or proper in order that such vessel shall be suitable for economical and speedy conversion into a naval or military auxiliary, or otherwise suitable for the use of the United States Government in time of war or national emergency. If the Secretary of the Navy approves such plans and specifications as submitted, or as modified, in accordance with the provisions of this subsection, he shall certify such approval to the Secretary of Commerce.

(c) Any citizen of the United States or any shipyard of the United States may make application to the Secretary of Commerce for a construction-differential subsidy to aid in reconstructing or reconditioning any vessel that is to be used in the foreign commerce of the United States. If the Secretary of Commerce in the exercise of his discretion, shall determine that the granting of the financial aid applied for is reasonably calculated to carry out effectively the

purposes and policy of this chapter, the Secretary of Commerce may approve such application and enter into a contract or contracts with the applicant therefor providing for the payment by the United States of a construction-differential subsidy that is to be ascertained, determined, controlled, granted, and paid, subject to all the applicable conditions and limitations of this subchapter and under such further conditions and limitations as may be prescribed in the rules and regulations the Secretary of Commerce has adopted as provided in section 1114(b) of this title; but the financial aid authorized by this subsection shall be extended to reconstruction or reconditioning only in exceptional cases and after a thorough study and a formal determination by the Secretary of Commerce that the proposed reconstruction or reconditioning is consistent with the purposes and policy of this chapter.

6. Section 502 of the Act, 46 U.S.C. 1152, provides:

> (a) If the Secretary of the Navy certifies his approval under section 1151(b) of this title, and the Secretary of Commerce approves the application, he may secure bids for the construction of the proposed vessel according to the approved plans and specifications. If the bid of the shipbuilder who is the lowest responsible bidder is determined by the Secretary of Commerce to be fair and reasonable, the Secretary of Commerce may approve such bid, and if such approved bid is accepted by the proposed ship purchaser, the Secretary of Commerce is authorized to enter in-

to a contract with the successful bidder for the construction, outfitting, and equipment of the proposed vessel, and for the payment by the Secretary of Commerce to the shipbuilder, on terms to be agreed upon in the contract, of the contract price of the vessel, out of the construction fund hereinbefore referred to, or out of other available funds. Notwithstanding the provisions of the first sentence of section 1155 of this title with respect to competitive bidding, the Secretary of Commerce is authorized, at any time prior to June 30, 1979, to accept a price for the construction of the ship which has been negotiated between a shipyard and proposed ship purchaser if (1) the proposed ship purchaser and the shipyard submit backup cost details and evidence that the negotiated price is fair and reasonable; (2) the Secretary of Commerce finds that the negotiated price is fair and reasonable; and (3) the shipyard agrees that the Comptroller General of the United States or any of his duly authorized representatives shall, until the expiration of three years after final payment have access to and the right to examine any pertinent books, documents, papers, and records of the shipyard or any of its subcontractors related to the negotiation or performance of any contract or subcontract negotiated under this subsection and will include in its subcontracts a provision to that effect. Concurrently with entering into such contract with the shipbuilder, the Secretary of Commerce is authorized to enter into a contract for the sale of such vessel upon its completion, to the applicant if he is the proposed ship purchaser and if not to another citizen of the United States, if the Secretary of Commerce determines

that such citizen possesses the ability, experience, financial resources, and other qualifications necessary for the operation and maintenance of the vessel at a price corresponding to the estimated cost, as determined by the Secretary of Commerce pursuant to the provisions of this chapter, of building such vessel in a foreign shipyard.

(b) The amount of reduction in selling price which is herein termed "construction differential subsidy" shall equal, but not exceed, the excess of the bid of the shipbuilder constructing the proposed vessel (excluding the cost of any features incorporated in the vessel for national defense uses, which shall be paid by the Secretary in addition to the subsidy), over the fair and reasonable estimate of cost, as determined by the Secretary, of the construction of that type vessel if it were constructed under similar plans and specifications (excluding national defense features as above provided) in a foreign shipbuilding center which is deemed by the Secretary to furnish a fair and representative example for the determination of the estimated foreign cost of construction of vessels of the type proposed to be constructed. The Secretary of Commerce shall recompute such estimated foreign cost annually unless, in the opinion of the Secretary, there has been a significant change in shipbuilding market conditions. The Secretary shall publish notice of his intention to compute or recompute such estimated foreign cost and shall give interested persons, including but not limited to shipyards and shipowners and associations thereof, an opportunity to file written statements. The Secretary's consideration shall include, but not be limited to, all relevant matter

so filed, and his determination shall include or be accompanied by a concise explanation of the basis of his determination. The construction differential approved and paid by the Secretary shall not exceed 50 per centum of the cost of constructing, reconstructing, or reconditioning the vessel (excluding the cost of national defense features). If the Secretary finds that the construction differential exceeds, in any case, the foregoing percentage of such cost, the Secretary may negotiate with any bidder (whether or not such person is the lowest bidder) and may contract with such bidder (notwithstanding the first sentence of section 1155 of this title) for the construction, reconstruction, or reconditioning of the vessel involved in a domestic shipyard at a cost which will reduce the construction differential to such percentage or less. In the event that the Secretary has reason to believe that the bidding in any instance is collusive, he shall report all of the evidence on which he acted (1) to the Attorney General of the United States, and (2) to the President of the Senate and to the Speaker of the House of Representatives if the Congress shall be in session or if the Congress shall not be in session, then to the Secretary of the Senate and Clerk of the House, respectively.

(c) In such contract of sale between the purchaser and the Secretary of Commerce, the purchaser shall be required to make cash payments to the Secretary of Commerce of not less than 25 per centum of the price at which the vessel is sold to the purchaser. The cash payments shall be made at the time and in the same proportion as provided for the payments on account of the construction cost in the contract between

the shipbuilder and the Secretary of Commerce. The purchaser shall pay, not less frequently than annually, interest on those portions of the Secretary of Commerce's payments as made to the shipbuilder which are chargeable to the purchaser's portion of the price of the vessel (after deduction of the purchaser's cash payments) at a rate not less than (i) a rate determined by the Secretary of the Treasury, taking into consideration the current average market yield on outstanding marketable obligations of the United States with remaining periods to maturity comparable to the average maturities of such loans, adjusted to the nearest one-eighth of 1 per centum, plus (ii) an allowance adequate in the judgment of the Secretary of Commerce to cover administrative costs. The balance of such purchase price shall be paid by the purchaser, within twenty-five years after delivery of the vessel and in not to exceed twenty-five equal annual installments, the first of which shall be payable one year after the delivery of the vessel by the Secretary of Commerce to the purchaser. Interest at the rate per annum applicable to payments that are chargeable to the purchaser's portion of the price of the vessel shall be paid on all such installments of the purchase price remaining unpaid.

(d) Repealed. Pub. L. 87-877, § 2(a), Oct. 24, 1962, 76 Stat. 1200.

(e) If no bids are received for the construction, outfitting, or equipping of such vessel, or if it appears to the Secretary of Commerce that the bids received from privately owned shipyards of the United States are collusive, excessive, or

unreasonable, and if a citizen of the United States agrees to purchase said vessel as provided in this section, then, to provide employment for citizens of the United States, the Secretary of Commerce may have such vessel constructed, outfitted, or equipped at not in excess of the actual cost thereof in a navy yard of the United States under such regulations as may be promulgated by the Secretary of the Navy and the Secretary of Commerce. In such event the Secretary of Commerce is authorized to pay for any such vessel so constructed from his construction fund. The Secretary of Commerce is authorized to sell any vessel so constructed, outfitted, or equipped in a navy yard to a citizen of the United States for the fair and reasonable value thereof, but at not less than the cost thereof less the equivalent to the construction differential subsidy determined as provided by subsection (b) of this section, such sale to be in accordance with all the provisions of this subchapter.

(f) The Secretary of Commerce, with the advice of and in coordination with the Secretary of the Navy, shall at least once each year, as required for purposes of this chapter, survey the existing privately owned shipyards capable of merchant ship construction, or review available data on such shipyards if deemed adequate, to determine whether their capabilities for merchant ship construction, including facilities and skilled personnel, provide an adequate mobilization base at strategic points for purposes of national defense and national emergency. The Secretary of Commerce, in connection with ship construction, reconstruction, reconditioning, or remodeling under this subchapter and subchapter

VII of this chapter, upon a basis of a finding that the award of the proposed construction, reconstruction, reconditioning, or remodeling work will remedy an existing or impending inadequacy in such mobilization base as to the capabilities and capacities of a shipyard or shipyards at a strategic point, and after taking into consideration the benefits accruing from standardized construction, the conditions of unemployment, and the needs and reasonable requirements of all shipyards, may allocate such construction, reconstruction, reconditioning, or remodeling to such yard or yards in such manner as he may determine to be fair, just, and reasonable to all sections of the country, subject to the provisions of this subsection. In the allocation of construction work to such yards as herein provided, the Secretary of Commerce may, after first obtaining competitive bids for such work in compliance with the provisions of this chapter, negotiate with the bidders and with other shipbuilders concerning the terms and conditions of any contract for such work, and is authorized to enter into such contract at a price deemed by the Secretary of Commerce to be fair and reasonable. Any contract entered into by the Secretary of Commerce under the provisions of this subsection shall be subject to all of the terms and conditions of this chapter, excepting those pertaining to the awarding of contracts to the lowest bidder which are inconsistent with the provisions of this subsection. In the event that a contract is made providing for a price in excess of the lowest responsible bid which otherwise would be accepted, such excess shall be paid by the Secretary of Com-

merce as a part of the cost of national defense, and shall not be considered as a part of the construction-differential subsidy. In the event that a contract is made providing for a price lower than the lowest responsible bid which otherwise would be accepted, the construction-differential subsidy shall be computed on the contract price in lieu of such bid.

If, as a result of allocation under this subsection, the purchaser incurs expenses for inspection and supervision of the vessel during construction and for the delivery voyage of the vessel in excess of the estimated expenses for the same services that he would have incurred if the vessel had been constructed by the lowest responsible bidder the Secretary of Commerce (with respect to construction under this subchapter, except section 1159 of this title) shall reimburse the purchaser for such excess, less one-half of any gross income the purchaser receives that is allocable to the delivery voyage minus one-half of the extra expenses incurred to produce such gross income, and such reimbursement shall not be considered part of the construction-differential subsidy: *Provided*, That no interest shall be paid on any refund authorized under this chapter. If the vessel is constructed under section 1159 of this title the Secretary of Commerce shall reduce the price of the vessel by such excess, less one-half of any gross income (minus one-half of the extra expenses incurred to produce such gross income) the purchaser receives that is allocable to the delivery voyage. In the case of a vessel that is not to receive operating-differential subsidy, the delivery voyage shall be deemed terminated at the port where the vessel

begins loading. In the case of a vessel that is to receive operating-differential subsidy, the delivery voyage shall be deemed terminated when the vessel begins loading at a United States port in an essential service. In either case, however, the vessel owner shall not be compensated for excess vessel delivery costs in an amount greater than the expenses that would have been incurred in delivering the vessel from the shipyard at which it was built to the shipyard of the lowest responsible bidder. If as a result of such allocation, the expenses the purchaser incurs with respect to such services are less than the expenses he would have incurred for such services if the vessel had been constructed by the lowest responsible bidder, the purchaser shall pay to the Secretary of Commerce an amount equal to such reduction and, if the vessel was built with the aid of construction-differential subsidy, such payment shall not be considered a reduction of the construction-differential subsidy.

(g) Upon the application of any citizen of the United States to purchase any vessel acquired by the Secretary of Commerce under the provisions of section 1125 of this title, the Secretary of Commerce is authorized to sell such vessel to the applicant for the fair and reasonable value thereof, but at not less than the cost thereof to the Secretary of Commerce less depreciation at the rate of 4 per centum per annum from the date of completion, excluding the cost of national-defense features added by the Secretary of Commerce, less the equivalent of any applicable construction-differential subsidy as provided by subsection (b) of this section, such sale to be in

accordance with all the provisions of this subchapter. Such vessel shall thereupon be eligible for an operating-differential subsidy under subchapter VI of this chapter, notwithstanding the provisions of section 1171(a)(1), and section 1180(1) of this title, or any other provision of law.

7. Section 503 of the Act, 46 U.S.C. 1153, provides:

> Upon completion of the construction of any vessel in respect to which a construction-differential subsidy is to be allowed under this subchapter and its delivery by the shipbuilder to the Secretary of Commerce, the vessel shall be documented under the laws of the United States, and concurrently therewith, or as soon thereafter as practicable, the vessel shall be delivered with a bill of sale to the purchaser with warrantly against liens, pursuant to the contract of sale between the purchaser and the Secretary of Commerce. The vessel shall remain documented under the laws of the United States for not less than twenty-five years, or so long as there remains due the United States any principal or interest on account of the purchase price, whichever is the longer period. At the time of delivery of the vessel the purchaser shall execute and deliver a first-preferred mortgage to the United States to secure payment of any sums due from the purchaser in respect to said vessel: *Provided*, That notwithstanding any other provisions of law, the payment of any sums due in respect to a passenger vessel purchased under section 1737 (b) of Appendix to title 50, reconverted or restored for normal operation in commercial services, or in respect to a passenger vessel purchased under subchapter V of this chapter, which is delivered subsequent to March 8, 1946, and which (i) is of not less than ten thousand gross tons, (ii) has a designed speed approved by the Secretary of Commerce but not less than eighteen knots, (iii) has accommodations for not less than two hundred passengers, and, (iv) is approved by the Secretary of Defense as being desirable for national defense purposes, may, with the approval of the Secretary of Commerce be secured only by a first-preferred mortgage on said vessel. With the approval of the Secretary of Commerce, such preferred mortgage may provide that the sole recourse against the purchaser of such a passenger vessel under such mortgage, and any of the notes secured thereby, shall be limited to repossession of the vessel by the United States and the assignment of insurance claims, if the purchaser shall have complied with all provisions of the mortgage other than those relating to the payment of principal and interest when due, and the obligation of the purchaser shall be satisfied and discharged by the surrender of the vessel, and all right, title, and interest therein to the United States. Such vessel upon surrender shall be (i) free and clear of all liens and encumbrances whatsoever, except the lien of the preferred mortgage, (ii) in class, and (iii) in as good order and condition, ordinary wear and tear excepted, as when acquired by the purchaser, except that any deficiencies with respect to freedom from encumbrances, condition, and class, may, to the extent covered by valid policies of insurance, be satisfied by the assignment to the

United States of claims of the purchaser under such policies of insurance. The purchaser shall also comply with all the provisions of section 868 of this title.

8. Section 504 of the Act, 46 U.S.C. 1154 provides:

> If a qualified purchaser under the terms of this subchapter desires to purchase a vessel to be constructed in accordance with an application for construction-differential subsidy under this subchapter, the Secretary of Commerce may, in lieu of contracting to pay the entire cost of the vessel under section 1152 of this title, contract to pay only construction-differential subsidy and the cost of national defense features to the shipyard constructing such vessel. The construction-differential subsidy and payments for the cost of national defense features shall be based upon the lowest responsible domestic bid unless the vessel is constructed at a negotiated price as provided by section 1152(a) of this title or under a contract negotiated by the Secretary of Commerce as provided in section 1152(b) of this title in which event the construction-differential subsidy and payments for the cost of national defense features shall be based upon such negotiated price. No construction-differential subsidy, as provided in this section, shall be paid unless the said contract or contracts or other arrangements contain such provisions as are provided in this subchapter to protect the interests of the United States as the Secretary of Commerce deems necessary. Such vessel shall be documented under the laws of the United States as provided in section 1153 of this title. The

> contract of sale, and the mortgage given to secure the payment of the unpaid balance of the purchase price, shall not restrict the lawful or proper use or operation of the vessel, except to the extent expressly required by law.

9. Section 505 of the Act, 46 U.S.C. 1155, provides:

> All construction in respect of which a construction-differential subsidy is allowed under this subchapter shall be performed in a shipyard of the United States as the result of competitive bidding, after due advertisement, with the right reserved in the Secretary of Commerce to disapprove, any or all bids. In all such construction the shipbuilder, subcontractors, materialmen, or suppliers shall use, so far as practicable, only articles, materials, and supplies of the growth, production, or manufacture of the United States as defined in paragraph K of section 1401 of title 19; *Provided, however*, That with respect to other than major components of the hull, superstructure, and any material used in the construction thereof, (1) if the Secretary of Commerce determines that the requirements of this sentence will unreasonably delay completion of any vessel beyond its contract delivery date, and (2) if such determination includes or is accompanied by a concise explanation of the basis therefor, then the Secretary of Commerce may waive such requirements to the extent necessary to prevent such delay. No shipbuilder shall be deemed a responsible bidder unless he possesses the ability, experience, financial resources, equipment, and other qualifications necessary properly to perform the proposed contract. Each

bid submitted to the Secretary of Commerce shall be accompanied by all detailed estimates upon which it is based. The Secretary of Commerce may require that the bids of any subcontractors, or other pertinent data, accompany such bid. All such bids and data relating thereto shall be kept on file until disposed of as provided by law. For the purposes of this subchapter V, the term "shipyard of the United States" means shipyards within any of the United States and the Commonwealth of Puerto Rico.

10. Section 506 of the Act, 46 U.S.C. 1156, provides:

> Every owner of a vessel for which a construction-differential subsidy has been paid shall agree that the vessel shall be operated exclusively in foreign trade, or on a round-the-world voyage, or on a round voyage from the west coast of the United States to a European port or ports which includes intercoastal ports of the United States, or a round voyage from the Atlantic coast of the United States to the Orient which includes intercoastal ports of the United States, or on a voyage in foreign trade on which the vessel may stop at the State of Hawaii, or an island possession or island territory of the United States, and that if the vessel is operated in the domestic trade on any of the above-enumerated services, he will pay annually to the Secretary of Commerce that proportion of one-twenty-fifth of the construction-differential subsidy paid for such vessel as the gross revenue derived from the domestic trade bears to the gross revenue derived from the entire voyages completed dur-

> ing the preceding year. The Secretary may consent in writing to the temporary transfer of such vessel to service other than the service covered by such agreement for periods not exceeding six months in any year, whenever the Secretary may determine that such transfer is necessary or appropriate to carry out the purposes of this chapter. Such consent shall be conditioned upon the agreement by the owner to pay to the Secretary, upon such terms and conditions as he may prescribe, an amount which bears the same proportion to the construction-differential subsidy paid by the Secretary as such temporary period bears to the entire economic life of the vessel. No operating-differential subsidy shall be paid for the operation of such vessel for such temporary period.

11. Section 1104 of the Act, 46 U.S.C. 1274, provides in relevant part:

> (a) Pursuant to the authority granted under section 1273(a) of this title, the Secretary of Commerce, upon such terms as he shall prescribe, may guarantee or make a commitment to guarantee, payment of the principal of and interest on an obligation which aids in—
>
> > (1) financing, including reimbursement of an obligor for expenditures previously made for, construction, reconstruction, or reconditioning of a vessel or vessels owned by citizens of the United States which are designed principally for research, or for commercial use (A) in the coastwise or intercoastal trade; (B) on the Great Lakes, or on bays, sounds, rivers, harbors, or inland

lakes of the United States; (C) in foreign trade as defined in section 1244 of this title for purposes of subchapter V of this chapter; (D) in the fishing trade or industry; or (E) with respect to floating drydocks, in the construction, reconstruction, reconditioning, or repair of vessels: *Provided, however,* That no guarantee shall be entered into pursuant to this paragraph (a)(1) later than one year after delivery, or redelivery in the case of reconstruction or reconditioning of any such vessel unless the proceeds of the obligation are used to finance the construction, reconstruction, or reconditioning of a vessel or vessels, or facilities or equipment pertaining to marine operations;

(2) financing the purchase of vessels theretofore acquired by the Fund under the provisions of section 1275 of this title and reconditioning and reconstructing such vessels;

(3) financing, in whole or in part, the repayment to the United States of any amount of construction-differential subsidy paid with respect to a vessel pursuant to subchapter V of this chapter; or

(4) refinancing existing obligations issued for one of the purposes specified in (1), (2), or (3) whether or not guaranteed under this subchapter, including, but not limited to, short-term obligations incurred for the purpose of obtaining temporary funds with the view to refinancing from time to time.

(b) Obligations guaranteed under this subchapter—

(1) shall have an obligor approved by the Secretary of Commerce as responsible and possessing the ability, experience, financial resources, and other qualifications necessary to the adequate operation and maintenance of the vessel or vessels which serve as security for the guarantee of the Secretary of Commerce;

(2) subject to the provisions of paragraph (1) of subsection (c) of this section, shall be in an aggregate principal amount which does not exceed 75 per centum of the actual cost or depreciated actual cost, as determined by the Secretary of Commerce, of the vessel which is used as security for the guarantee of the Secretary of Commerce: *Provided, however,* That in the case of a vessel, the size and speed of which are approved by the Secretary of Commerce, and which is or would have been eligible for mortgage aid for construction under section 1159 of this title (or would have been eligible for mortgage aid under section 1159 of this title except that the vessel was built with the aid of construction-differential subsidy and said subsidy has been repaid) and in respect of which the minimum downpayment by the mortgagor required by that section would be or would have been 12½ per centum of the cost of such vessel, such obligations may be in an amount which does not exceed 87½ per centum of such actual cost or depreciated actual cost: *Provided,*

> *further*, That the obligations which relate to a barge which is constructed without the aid of construction-differential subsidy, or, if so subsidized, on which said subsidy has been repaid, may be in an aggregate principal amount which does not exceed 87½ per centum of the actual cost or depreciated actual cost thereof; * * *

12. Rule 54(b) of the Federal Rules of Civil Procedure provides:

> When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

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